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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID JOHNS BRYSON,

Petitioner,

v.

THE CITY OF OKLAHOMA CITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Joyce Gilchrist's laboratory notes demonstrated that David Bryson could not have been guilty of the rape, sodomy, and kidnaping of a young legal secretary. Gilchrist's testing data revealed the rapist was a non-secretor, whereas suspect David Bryson was a B secretor. Those notes were turned over to the defense pursuant to a 2002 court order and were first in the hands of David Bryson's counsel, then Jack Fisher, on September 27, 2002. However, David Bryson's trial had occurred in 1983. By 2002, his resumé included the experience of having served seventeen years imprisonment for the 1982 assault on the legal secretary.

Also in the city laboratory files were numerous examples of Gilchrist errors in serology and hair comparison examinations. A 2002 report, which was issued following a review of her work by an Oklahoma State Bureau of Investigation team, revealed errors existed in at least 159 cases which had been assigned to Gilchrist in the 1982-1994 time period. A 1999-2001 investigation by a City of Oklahoma City Review Board showed that Gilchrist had never learned to perform her basic laboratory tasks. For approximately two decades, no one had undertaken the duty of assuring her work was accurate.

This case presents questions of whether the due process clause of the United States Constitution's Fourteenth Amendment is offended, and whether

QUESTIONS PRESENTED – Continued

municipal liability is incurred under 42 U.S.C. § 1983, when there has been extreme abdication of the duty to train and supervise a police employee whose work, if not accurate, predictably could cause wrongful convictions. This case also raises issues regarding municipal liability for Fourteenth Amendment Due Process Clause violations occurring subsequent to the wrongful conviction.

Particularly, these questions exist:

1. When inaccurate forensic evidence, produced fraudulently in contravention of the Due Process Clause of the Fourteenth Amendment, results in wrongful conviction, is the municipality employing the incompetent chemist liable for civil rights damages, under 42 U.S.C. § 1983, for that single incident of forensic failure when the municipality has not implemented relevant training, supervision, or other quality control and, at the time of the wrongful conviction, documents contained in municipal files demonstrated the forensic analyst's incompetence?

2. Does a municipality offend the Due Process Clause of the United States Constitution's Fourteenth Amendment, and is it liable for civil rights damages pursuant to 42 U.S.C. § 1983, when the continued incarceration of an innocent man occurs in conjunction with the city's long-term failure to train, supervise, or implement quality control, and an error-prone analyst, after the city has been on notice that the

QUESTIONS PRESENTED – Continued

particular chemist's work is unreliable, is allowed to participate in covering up her errors in the innocent man's case?

3. Does a city's decision to pay off the tortfeasor, to avoid an indemnification payment to the plaintiff, violate the plaintiff's due process rights, under the Fourteenth Amendment of the United States Constitution, and violate federal public policy principles, when the plaintiff has been denied his request to be heard regarding the indemnification questions and when the indemnification agreement results in encouraging public employees to violate the Fourteenth Amendment due process rights of citizens?

LIST OF PARTIES

All current parties appear in the caption of the case or on the cover page. Previous parties to the action were former District Attorney Robert Macy, former Oklahoma City Police Department laboratory analyst Joyce Gilchrist, and former Oklahoma City Police Department supervisors Sam Gonzales, Robert Wilder, David McBride, Walt Wilhelm, and H.M. Campbell.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at pages 1-15 of the Appendix and is reported at 627 F.3d 784.

The August 17, 2009 order of the United States District Court for the Western District of Oklahoma denying indemnification relief appears at pages 16-23 of the Appendix and is unpublished.

The June 17, 2009 order of the United States District Court denying Petitioner Bryson's motion for reconsideration appears at pages 24-28 of the appendix and is unpublished.

The April 30, 2009 opinion of the United States District Court for the Western District of Oklahoma appears at pages 29-101 of the Appendix and is published at 611 F.Supp.2d 1234.

The January 14, 2011 United States Court of Appeals order denying David Bryson's petition for rehearing is unpublished and appears at pages 102-103 of the Appendix.

JURISDICTION

The United States Court of Appeals opinion sought to be reviewed was entered on December 6, 2010.

A timely petition for rehearing was denied by the Court of Appeals on January 14, 2011. Appendix, pages 102-103.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Section 1983, of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 51, Section 162(A), of the Oklahoma Statutes provides in pertinent part:

> The State or any political subdivision, subject to procedural requirements imposed by this section, other applicable statute, ordinance, resolution, or written policy, shall:
>
> . . .
>
> Pay or cause to be paid any judgment entered in the courts of the United States, the State of Oklahoma or any other state against any employee or political subdivision or settlement agreed to by the political subdivision entered against any employee, and any costs or fees for a violation of property rights or any rights, privileges or immunities secured by the Constitution or the laws of the United States which occurred while the employee was acting within the scope of employment.

Article IV, Section 2-323, of the Oklahoma City Municipal Code provides:

> As authorized by 51 O.S. § 162, the Council of the City establishes higher limits of indemnification for civil rights claims only

> for individual employees acting within the scope of employment where claims are made against said employee for violations of the claimant's Federal civil rights and the employee has been named personally as an individual defendant in the lawsuit for violating the claimant's Federal civil rights, then, in such event, the City shall indemnify such employee against claims, demands, and judgments for actual damages up to and including the sum of $10,000,000.00 to any claimant for the claim arising out of the alleged violation of claimant's Federal civil rights. Provided, however, this authorization shall not permit indemnification for exemplary or punitive damages.

STATEMENT OF THE CASE

A. Factual Background

1. Pre-Conviction Documentation of Gilchrist Deficits, Laboratory Failures

Long before 1983, when she caused David Bryson's wrongful rape conviction through inaccurate hair and serology evidence, Joyce Gilchrist was inept as a student of science.

Her struggles with scientific principles began many years prior to her eventual termination, in 2001, from her employment as a forensic scientist in the City of Oklahoma City's police laboratory. In 2001, the city, after more than two decades of

utilizing her as an analyst and witness in many of Oklahoma City's most serious criminal cases, and after more than two decades of promoting her and commending her for assistance in obtaining convictions, decided that Ms. Gilchrist was incompetent and dishonest.

But science and Ms. Gilchrist were an incompatible couple at least as early as the 1966-1968 time period when she studied at the University of Oklahoma. During those years, her grades were D in general chemistry, D in introduction to zoology, and F in human physiology. In the same 1966-1968 segment of her college career she took the general chemistry course a second time. She again made a D. She enrolled in general chemistry a second time and withdrew.

In the 1969-1972 time span, her grades improved slightly. She achieved C's in two chemistry courses and in hematology. However, her grades were D's in anthropology, human physiology, and parasitology. She left the University of Oklahoma in 1972 with a 1.91 grade point average on a four-point scale.

She began studying at the University of Central Oklahoma in 1974. Her grades again showed slight improvement. However she was academically suspended in 1978. She eventually received a bachelor of science degree from the University of Central Oklahoma on May 8, 1980, graduating with a low C average.

That year, 1980, was the year she began employment at the city's police laboratory.

In college, she had received no training in hair comparison techniques or in forensic blood typing analysis.

She was sent by the city, in 1981, to a Federal Bureau of Investigation academy to learn to conduct hair comparisons and to study serological techniques.

After the attendees were instructed on the properties of hairs, the FBI administered a test. Ms. Gilchrist was incorrect four of ten times on the first test, where the sole task was to determine the species. She was wrong in regard to two of eight human hairs, when she was asked to determine the part of the body from which the hair came. When given a second test on whether she could determine the part of the body associated with the questioned hair, she thought an eyebrow hair was a limb hair, identified what was actually a head hair as being a pubic hair, and said a pubic hair was an auxiliary hair.

Even though she could not perform these screening tasks successfully, Ms. Gilchrist was never again given a similar test to determine if her hair comparison skills had improved.

If the FBI's serology course had testing paralleling the hair testing, such examination is not reflected in the city's files regarding her FBI training. The City of Oklahoma City files contained no record of Ms. Gilchrist flunking blind serology testing at the FBI

school, but also contained no record that she could analyze bodily fluids correctly.

The City of Oklahoma City's records do contain examples of erroneous work by Gilchrist, beginning in 1982 and spanning a number of years. At least one 1981 case is included in the Oklahoma State Bureau of Investigation's extensive review of Ms. Gilchrist's work, but for the most part, no files pre-dating 1982 were still existent for the OSBI to evaluate in its 2001-2002 review of case files from the Oklahoma City Police Department forensic laboratory.

The OSBI's report – the end result of a laboratory investigation jointly requested by Oklahoma's governor, Frank Keating, and attorney general, Drew Edmondson – mentions improper procedure regarding an acid phosphatase test conducted on April 19, 1982. Volume 11, page 3171 of the appendix to the Tenth Circuit appeal. This OSBI document, appearing at pages 3151-3207 of the Tenth Circuit appendix and based on a review of the City of Oklahoma City's own laboratory files, also identifies erroneous laboratory work in other cases preceding and/or contemporaneous with David Bryson's case. Mr. Bryson's case, in its first phase of laboratory analysis, was an active case from the fall of 1982 until February 1993. Mr. Bryson's Oklahoma City laboratory case number was ST-82-336.

The OSBI criticized Gilchrist's work in cases ST-81-316, ST-82-158, ST-82-200, ST-82-224, ST-82-238,

ST-82-250, ST-82-380, ST-82-438, ST-82-638, ST-83-09, and ST-83-250.

In ST-83-250, she received conflicting results as to whether Antigen A was present, but also detected Antigen H. She issued a report saying simply that she detected Antigen H without mentioning the A antigen. The proper way of reporting the case, considering the details of the testing, would have been to label the results as being inconclusive.

In ST-82-200, Ms. Gilchrist erred in the opposite direction. Her laboratory notes showed that she obtained a result. However, she issued a report saying her testing was inconclusive.

In ST-82-438, she again reported a result even though her testing contained contradictory information. In ST-82-380 she formed a conclusion as to blood typing even though her testing was incomplete. ST-82-638 was mentioned for improper procedure in testing a blood sample, ST-82-224 for incomplete serology testing, and ST-81-316 and ST-82-158 for an improper hair comparison technique.

The academic record of Joyce Gilchrist, the results of her hair exam at the FBI academy, and the laboratory notes which formed the basis for the OSBI review were all contained in the files of the City of Oklahoma City. All the information thus far mentioned in this Statement of the Case was included in Petitioner Bryson's original response to Respondent city's motion for summary judgment, and/or in the attachments to that response.

Also included in that initial response was Douglas Lucas's expert report on the quality of forensic training and supervision at the time David Bryson's case was in its pretrial and trial phases. In his report, Lucas concluded:

> In Mr. Bryson's case, Ms. Gilchrist ignored her own serology results that should have been interpreted as excluding Mr. Bryson as a potential donor of the semen in the complainant's sexual assault samples; she in fact improperly interpreted them to include him. Appropriate peer review (or even a reasonable supervisory or administrative review of her report) would have quickly identified this before the report was issued.

Lucas earlier had noted that the City of Oklahoma City forensic laboratory's long-standing (1980-2001) deficits "included failure to ensure the use of critical quality assurance procedures such as peer review and proficiency testing, incompetent completion of performance evaluations, and failure to respond to criticism by the courts of staff testimony."

Although Gilchrist's errors in part resulted from her dishonesty, her lack of ability as a forensic chemist also was glaring. Lucas, who was involved in creating standards for crime laboratory management adopted by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/

LAB), wrote in his report regarding David Bryson's circumstances:

> Ms. Gilchrist lacked an acceptable level of competence in her serology and microscopic hair comparison examinations as a result, in part at least, of inadequate training and supervision by her superiors in the FLU and the OCPD.

Appendix to Tenth Circuit appeal, Volume 9, p. 2491. Lucas, the director of Toronto's public crime laboratory for twenty-seven years, was on the ASCLD/LAB inspection team for more than thirty forensic laboratories which were seeking accreditation.

Lucas noted that Captain Richard DeLaughter, who was the Oklahoma City laboratory supervisor in 1982-1983 when David Bryson's case was being analyzed, admitted in his deposition he "made no independent verification of the skills" required to perform laboratory functions. Lucas stated that, while the means of quality control may have varied from laboratory to laboratory in the 1982-1983 time frame, laboratories typically had some means of detecting "potential operational problems." Lucas added: "The OCPD Serology Lab appears to have been an exception to this."

As the United States District Court for the Western District of Oklahoma found, Appendix, page 63, there was not even a policy and procedure manual for the Oklahoma City Police Department forensic laboratory in 1982.

DeLaughter, like the laboratory supervisors who preceded him and like those who succeeded him, was a commissioned police officer with no significant scientific training. The City of Oklahoma City had a policy throughout Gilchrist's tenure of utilizing scientifically untrained police officers to supervise the forensic laboratory.

Neither the federal District Court nor the Tenth Circuit analyzed Lucas's report.

2. Continued Actions of Gilchrist and the City

In February of 1983, David Bryson was convicted of rape, sodomy, and kidnaping, after Joyce Gilchrist testified, consistent with her expert report, that the perpetrator, like David Bryson, had type B blood and was a secretor. Bryson was sentenced to 85 years imprisonment. Gilchrist also said that a pubic hair found on the victim's skirt was consistent with Bryson's pubic hair and that four scalp hairs connected to the sexual assault were consistent with Bryson's scalp hair.

None of this testimony was correct. When a competent forensic analyst, Brian Wraxall, examined Gilchrist's laboratory notes, he found that the rapist was not a B secretor and that Gilchrist's initial serological testing, contrary to her testimony, excluded David Bryson as being the assailant.

The hairs in question were different from those of David Bryson, according to an independent examination, undertaken by Douglas Deedrick, an FBI hair comparison expert.

Gilchrist had led the jury to believe that hair evidence from the crime scene was almost certainly from Bryson. She said on cross-examination: "I would think it would be impossible not to be able to distinguish hairs from two different individuals if that's what you're saying."

Gilchrist's laboratory notes, which were not provided to the defense until a 2003 court order required them to be produced, should have exonerated Bryson in 1982 or 1983. DNA testing should have exonerated him in 1998. Mr. Bryson, who first requested DNA testing in 1988, when he first heard about DNA, did not obtain DNA testing until 1997. Though exonerating DNA results existed in 1997, he was not released from prison until 1999, when a bond was set so that he could remain free pending a planned retrial. Ultimately, in 2003, all charges against Bryson were dismissed.

Mr. Bryson had been incarcerated for a crime he did not commit approximately seventeen years, counting both his prison time and his time in the custody of Oklahoma County's jail.

James Pearson, Bryson's attorney, acting promptly upon learning of the possibility of DNA testing, approached authorities about the testing in 1988. He believed he had obtained the consent of the district attorney to have the biological evidence subjected to DNA analysis. He contacted the Lifecodes company, where he planned to have the evidence sent. But a roadblock developed. Ms. Gilchrist told Pearson the biological evidence had been destroyed. A note, dated June 6, 1988, from Gilchrist's file, with Bryson's case

number – ST-82-336 – noted on it, states: "This evidence has been destroyed as per S.O.P. and therefore, we have nothing left with which to do DNA analysis on as requested by Def Atty Jim Pearson."

Gilchrist later would testify that she only meant to communicate to Pearson that some evidence which had been in the city laboratory had been destroyed, not that there was no evidence anywhere. Pearson remembered the conversation differently. Pearson believed Gilchrist was telling him there was no biological evidence still in existence anywhere which could be subjected to DNA analysis.

Despite the DNA setback, David Bryson's father, Major Eddie Bryson, employed an investigator, Marlene Cannon, to continue work on David Bryson's case. Ms. Cannon, in December of 1989, discovered there was biological evidence related to David Bryson's case in the office of the Oklahoma County court clerk. This evidence was inventoried.

The district attorney's office again was approached regarding an agreement for DNA testing. At this juncture, however, the prosecutor's office opposed testing. The prosecutor's office litigated all attempts to have the evidence analyzed. One prosecutor, Sandra Stensaas, told Jack Fisher, the third Oklahoma City attorney to be hired to work on David Bryson's case, that she "would go to jail before she would allow DNA testing."

When Fisher approached Gilchrist about the biological evidence, she told him it was on her window sill, but that there were plans to destroy it. Gilchrist wrote a memorandum, on September 6,

1996 regarding Fisher's request that the evidence be preserved for DNA testing: "As per ADA S. Stensaas, I can ignore this request. The attorney must make any request through the DA's office."

The first court order allowing DNA testing was issued on March 28, 1997. The evidence was received by Brian Wraxall at Serological Research Institute on April 2, 1997. On April 22, 1997, Mr. Wraxall wrote a report stating that the semen on the vaginal swabs could not have originated from David Bryson, and that the semen on the robe could not have originated from David Bryson.

Wraxall's analysis was confirmed by testing at LabCorp, which issued a report on September 3, 1997 stating that David Bryson was excluded as being a semen donor.

Nevertheless, the prosecution, with Gilchrist's assistance, resisted David Bryson's release.

Gilchrist, at a 1999 evidentiary hearing, testified that in her professional opinion, Bryson could not be excluded because the semen tested could have come from someone other than the perpetrator. Gilchrist also stated the victim (who by this point was dead and therefore could not reassert her own previous statements about the sexual attack) could have been mistaken about whether the perpetrator ejaculated, even though nothing in the victim's prior statements indicated any doubt about whether there was an ejaculation. Gilchrist said the semen which was tested could have come from the victim's 6:15 a.m. sexual partner.

In addition to the inherent lack of plausibility that the semen could be that from the 6:15 a.m. intercourse (especially since some semen came from a vaginal swab), the victim had reported that the morning sex had been with her fiancé. The fiancé's DNA profile had been obtained and he had been excluded as a possible donor of the semen.

Regardless, Gilchrist's explanation succeeded and the district judge denied relief. The judge ruled: "The evidence presented, coupled with a scientific explanation of the absence of Petitioner's semen and the presence of that of another, would have still led the jury at this Petitioner's trial in 1983 to conclude that Petitioner was guilty as charged." Excerpt from March 31, 1999 order of the District Court of Oklahoma County. The Oklahoma Court of Criminal Appeals, on August 13, 1999, reversed, finding, inter alia, that "DNA testing from two separate entities conclusively eliminates Petitioner, as well as the victim's fiancee. The evidence supports Petitioner's argument that the rapist did ejaculate. . . ." The appeals court ordered a new trial.

In this 1988-1999 time period when Gilchrist was being used to block Bryson's efforts to obtain DNA testing, Gilchrist also continued to rely on her bogus 1982-83 forensic determinations. At an evidentiary hearing in 1999, she testified that the semen donor was a B secretor and that crime scene hairs were consistent with David Bryson's hairs.

During the same time period, issues regarding Gilchrist's reliability were public.

The federal district judge in Mr. Bryson's case noted, Appendix, page 97, that in a separate civil rights lawsuit against Gilchrist, the Court found that, by 1986, "the OCPD had been alerted to serious deficiencies in Gilchrist's analysis and questions about her professionalism, in more than one case, and had taken no action in response." (Quotation from District Court opinion in present case) This mid-1980s public criticism of Gilchrist was followed by appellate court decisions finding fault with her work. *E.g., McCarty v. State*, 765 P.2d 1215, 1217-19 (Okla. Crim. 1988); *Miller v. State*, 809 P.2d 1317, 1319-20 (Okla. Crim. 1991).

However, the City of Oklahoma City virtually ignored the persistent indicia of Gilchrist's unreliability until 1999, when an additional decision, mentioning some of Gilchrist's significant history of missteps was published. *Mitchell v. Ward*, 150 F.Supp.2d 1194 (W.D. Okla. 1999), *rev'd in part, Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001).

When a police review board was assigned to investigate allegations against Gilchrist and when various auxiliary reviews of her work were undertaken, instances of Gilchrist's inaccuracy and Gilchrist's misconduct were identified as being commonplace.

Lucas's report states that when the OSBI reviewed 566 Gilchrist forensic cases, spanning the

1982-1994 time period, some deficiency was found in 159 (28 per cent) of them. However, this report did not come until 2002.

For the first two decades of her employment, Gilchrist had been allowed to follow her self-made scientific principles and codes of behavior without there being quality control at any stage above her. The review board, on September 21, 2001, concluded, among other things, it "could find little or no evidence that Joyce Gilchrist is able to properly conduct hair analysis."

B. The Present Civil Rights Lawsuit

A complaint alleging civil rights violations, pursuant to 42 U.S.C. § 1983 was brought by David Bryson in the United States District Court for the Western District of Oklahoma. Pendant state law claims were also contained in the suit. Defendants were the City of Oklahoma City, Joyce Gilchrist, former District Attorney Robert Macy, and some of Gilchrist's former supervisors. As to the city, Bryson's allegations included claims that Oklahoma City's failure to train and supervise Gilchrist resulted in violation of his due process rights.

After motions to dismiss were filed, the District Court ruled that some claims were not viable. However, each of the defendants remained as a party to the case. Defendant Sam Gonzales, a former chief of

police of the City of Oklahoma City, took a successful interlocutory appeal. *Bryson v. Gonzales*, 534 F.3d 1282 (10th Cir. 2008).

Stipulations of dismissal subsequently were entered in the District Court as to the remaining former city employees who had been supervisors of Gilchrist.

The District Court ruled that Bryson's evidence raised an issue of fact regarding the sufficiency of the city's training and supervision of Gilchrist. However, the Court stated that the city was not on notice of prior Gilchrist misconduct in 1982-1983 when Bryson's case was pending. Therefore, the Court reasoned, the failure to train and supervise did not amount to deliberate indifference. The Court also found that Bryson's case did not fall within the "narrow range of circumstances" where the need for more or different training or supervision was so obvious that the city would be responsible for Gilchrist's unconstitutional activities.

Gilchrist's motion for summary judgment was denied. Former District Attorney Robert Macy's motion for summary judgment, which addressed only the federal constitutional claims against Macy, was granted. A state law negligence claim, not litigated in the motion for summary judgment, remained for trial.

The Macy negligence claim was settled. Bryson and Gilchrist, pursuant to a settlement conference before a magistrate, negotiated a $16.5 million judgment in favor of Bryson and against Gilchrist.

Gilchrist had filed an indemnification claim against the city. Bryson asked to participate in the indemnification proceedings and also asked for an indemnification judgment against the city. Both requests were denied by the District Court.

The city paid Gilchrist and her attorney $23,364.29 in exchange for Gilchrist dropping her indemnification claim. Bryson challenged the propriety of the arrangement between Gilchrist and the city.

Bryson appealed to the Tenth Circuit, contending the summary judgment grant as to the Section 1983 claims against the city was erroneous and arguing the district court's indemnification rulings should be overturned. The Tenth Circuit affirmed the rulings of the District Court.

REASONS FOR GRANTING THE PETITION

I.

THE COURT SHOULD DECIDE THE QUESTION, LEFT OPEN IN *CITY OF CANTON V. HARRIS*, WHETHER GLARING ABSENCE OF POLICE TRAINING AND SUPERVISION REGARDING SENSITIVE TASKS CAN RESULT IN MUNICIPAL LIABILITY EVEN IF THE PLAINTIFF'S CASE IS THE FIRST DOCUMENTED CATASTROPHE ENGENDERED BY THE MUNICIPAL DISREGARD FOR THE RUDIMENTS OF QUALITY CONTROL.

In *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989), this Court stated that in some

circumstances a need for training might be so obvious that a municipality could be liable for that failure to train, even in the absence of a pattern of prior constitutional violations.

The Court, since 1989, has not decided whether there is an obvious need for training when a police officer has the clear capacity to cause wrongful convictions if her duties are performed incorrectly. One issue is whether the danger of a wrongful conviction is analogous to the danger of causing physical harm such that – if nothing is done to avert the potential calamity, a municipality could be liable for a single incident, or, as in the present case, a first event in a series of occurrences, of unconstitutional harm.

The Court, in *Connick v. Thompson*, ___ U.S. ___, 2011 WL 1119022 (March 29, 2011), recently took a first step toward addressing a claim of obvious need for training in the wrongful conviction context.

The Court determined that there was not an obvious need for better prosecutorial training, in part because the supervising authority had reason to believe the offending employees were highly trained and highly educated prosecutors. The Court contrasted requirements regarding police training with the lesser supervisory concerns when law school graduates are the employees:

> Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for

> specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal "[t]raining is what differentiates attorneys from average public employees." 578 F.3d, at 304-305 (opinion of Clement, J.).
>
> Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment.

Connick v. Thompson, Part C.

In the same section of the opinion, Justice Thomas, writing for a majority of the Court, noted that "[a] licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton*'s untrained officer.

The present case thus presents the contention, yet to be addressed by this Court, that there is municipal liability when a police officer, as opposed to a prosecutor, fails to receive the necessary training that

in some cases will determine whether wrongful convictions occur.

Gilchrist, although she had a college degree, was, at best, possessing relevant background similar to the experience a rookie beat police officer would have when first being hired. She obtained no college training in the tasks to which she was assigned and had not distinguished herself in any prior schooling that might be tangentially relevant to her work at the Oklahoma City Police Department laboratory.

Thus, a primary issue in Bryson's case concerns the next logical step, after *Connick v. Thompson*, in addressing a municipality's constitutional obligations to provide training and supervision which would be obviously necessary to prevent the conviction of the innocent.

Additionally, a split of authority now exists regarding single-incident liability for failure to provide police training that could remove the wall between the accused and his evidence of innocence. The Sixth Circuit has ruled that since the "highly predictable consequence" of failure to provide exculpatory evidence training is a constitutional violation, a municipality may be liable for the training deficiency even absent a history of prior unconstitutional behavior. *Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006). See also *Moldowan v. City of Warren*, 578 F.3d 351, 393 (6th Cir. 2009).

The Tenth Circuit, in the present case, ruled in a manner opposite to *Gregory* regarding allegedly

single-incident liability for training and supervision deficits which deprived the accused, David Bryson, of exculpatory evidence.

The Bryson case also gives the Court the opportunity to consider whether the severity of the training and supervision deficits should be considered in determining whether to impose liability squarely on the basis of the lack of quality control. See *Young v. City of Providence*, 404 F.3d 4, 27 (1st Cir. 2005); *Sarus v. Rotundo*, 831 F.2d 397, 401 (2d Cir. 1987).

In Bryson's case, the laboratory supervisor, by his own admission, was doing almost nothing to assure that the analysts produced quality work. The files were replete with laboratory notes revealing laboratory errors. Nobody was looking at them. If "deliberate indifference" is to be the standard, consideration must be given to the notion that the most severe abdication of responsibility is to do nothing under circumstances where the need for quality control is apparent. A mechanistic formula of determining whether there were prior instances of reported misconduct does not necessarily identify the darkest instances of deliberate indifference. The particularly egregious examples of unconstitutional misconduct occur when the municipality, regardless of whether there has been a prior explosion, ignores the fires which are burning near the powder keg.

David Bryson contends that his case should not be viewed as a single or initial instance case. His position is that the city is charged with notice of

Gilchrist's incompetence because her errors and inabilities, which existed prior to her examination of Bryson's evidence, were contained in the city's files.

However, the lower courts have identified this as a single or initial-incident case and have analyzed it accordingly.

The Court should grant certiorari to determine whether the City of Oklahoma City's failure to train and supervise Gilchrist ignored an obvious risk of extreme harm which was essentially the same as sending a police officer amidst the public with a weapon without training him how to use it.

The Sixth Circuit and Tenth Circuit have reached opposite conclusions regarding this issue.

Deciding the single-incident issue in the context of police training needed to avoid wrongful convictions, is the next logical step, beyond *Connick v. Thompson*, in the development of the law.

II.

THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO ADDRESS THE PREVIOUSLY UNANSWERED QUESTION OF WHETHER A MUNICIPALITY, WHICH IS ON NOTICE OF PRIOR MISBEHAVIOR OF ITS CHEMIST, IS LIABLE FOR ITS CHEMIST'S UNCONSTITUTIONAL BEHAVIOR IN TRYING TO KEEP AN INNOCENT MAN IN PRISON.

Joyce Gilchrist, in 1997, after DNA testing showed that the semen did not come from David

Bryson, wrote a note stating her belief that there was not a biological connection between David Bryson and the offense.

Her later explanations for why David Bryson might be guilty were factually flawed.

However, Gilchrist's liability for the continued incarceration of Bryson was not dependent on and preceded any reference to DNA testing.

She had submitted a misleading report to the court, the accused, and the public, and, at the same time, was concealing laboratory notes which showed that the rapist was not a B secretor. These exonerating notes were not turned over until 2003, when a court ordered them produced.

Gilchrist was not merely shirking whatever ethical duty she may have had to an innocent man in search of exculpatory evidence. She was actively perpetrating a fraud.

This fraudulent behavior offended due process, regardless of the stage of the case. When the fraud was being perpetuated against David Bryson, the city was on notice of multiple reports of Gilchrist's deficiencies in forensic work. Therefore, the city was deliberately indifferent by not taking steps to determine whether her activities, in David Bryson's case, were consistent with sound laboratory practices, were honest, and were in keeping with constitutional requirements.

In a case, also involving Gilchrist, and involving Gilchrist's simultaneous suppression of exculpatory evidence and creation of fraudulent evidence, the United States Court of Appeals for the Tenth Circuit ruled that the facts, as asserted, supported a civil rights cause of action for the "continued confinement" of the accused in violation of the constitution. *Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004). See also *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988).

Despite these prior rulings that it was actionable to cause continued unconstitutional confinement, both the District Court and the Tenth Circuit, in Bryson's case considered, in determining whether there was a constitutional violation, only the activity prior to David Bryson's conviction. The courts designated this 1982-1983 era as the "relevant time period."

This Court should grant certiorari to resolve the important issue of whether Section 1983 wrongful incarceration liability can be imposed for actions subsequent to conviction or if only the time before conviction can be considered.

III.

THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER THE CITY, BY PAYING OFF TORTFEASOR GILCHRIST IN AN ATTEMPT TO AVOID INDEMNIFICATION LIABILITY, ACTED IN CONTRAVENTION OF FEDERAL PUBLIC POLICY, FEDERAL DUE PROCESS PRINCIPLES, AND/OR FEDERAL ESTOPPEL LAW.

Joyce Gilchrist, in the present action, filed a cross-claim against the City of Oklahoma City for indemnification.

After Bryson obtained a $16.5 million judgment against Gilchrist, the city paid Gilchrist and her attorney $23,364.29 in exchange for her dropping her indemnification contention.

Bryson, who previously had been denied in his request to participate in the process of adjudicating the indemnification issues, sought his own indemnification judgment against the city and appealed the city/Gilchrist payoff arrangement as being contrary to public policy.

The Tenth Circuit affirmed the district court's indemnification rulings, stating among other things, that Bryson did not have a right to intervene.

Contrary to what the Tenth Circuit had been led to believe in a prior unpublished case, Oklahoma law does permit a third party who stands to benefit from someone else's contractual arrangement to

participate as a real party in interest. *Schmidt v. Nash*, 217 P.2d 830, 832 (Okla. 1950). Furthermore, if the party who has the incentive to want to prevent poor public policy is not allowed to participate, not only collusive financial arrangements, but also ultimately unconstitutional behavior, will be encouraged.

If a municipal employee stands to reap financial reward from violating someone's constitutional rights, unconstitutional behavior naturally will be encouraged rather than discouraged.

Thus, if Bryson cannot be heard to try to prevent what he regards as an egregious conspiracy to perpetuate the disregard of Bryson's constitutional rights, no litigant's voice will be heard to try to stop such payoffs.

Oklahoma law permits indemnification of employees who were acting in the scope of their employment. 51 Okla. Stat. § 162. Oklahoma City Municipal Ordinance Section 2-323 provides that the city shall indemnify civil rights awards up to Ten Million Dollars if the person was within the scope of employment. The City should be estopped from contending that Gilchrist was sufficiently within the scope of employment that she should receive personal financial benefit, but not sufficiently within the scope of employment for the plaintiff to receive indemnification money. See *Oladeinde v. City of Birmingham*, 118 F.Supp.2d 1200, 1208 (N.D. Ala. 1999).

In *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992), a federal court found an indemnification agreement which encouraged the violation of constitutional rights to be unenforceable. The Tenth Circuit, prior to Bryson's case, also found void an indemnification contract that encouraged unconstitutional activity. *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1198-99 (10th Cir. 2002). The Third Circuit, on the other hand, approved an indemnification arrangement similar to those in *Weaver* and *Wessel*. *Hohe v. Zimmerman*, 956 F.2d 399, 412 (3d Cir. 1999).

The Court should resolve this conflict and should address this important public policy issue regarding indemnification agreements.

The city's attempt to avoid its responsibilities, an additional step in a long series of steps which landed squarely on Mr. Bryson, is a payoff which violates public policy and condones unconstitutional activity. The Court should grant certiorari and intervene to deny the city and Gilchrist the benefits of their arrangement.

CONCLUSION

David Bryson, who was confined seventeen years for a sexual assault perpetrated by someone else, was subjected to his ordeal as a direct result of the city's failure to train and supervise. The city's failures caused inaccurate forensic data to determine his case.

The Court should grant certiorari to resolve important issues surrounding the city's abdication of its quality control responsibilities. The Court further should resolve the conflict between the Sixth Circuit and the Tenth Circuit regarding single-incident municipal liability for failure to provide training needed to assure the production of exculpatory evidence.

A certiorari grant as to the indemnification issue would stop instances of collusive arrangements that reward tortfeasors and encourage unconstitutional activity.

Respectfully submitted,

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April 14, 2011

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DAVID JOHNS BRYSON, Plaintiff-Appellant, v. CITY OF OKLAHOMA CITY, Defendant-Appellee, and JOYCE GILCHRIST, individually, Defendant.	Nos. 09-6143 & 09-6182

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 05-CV-01150-F)

(Filed Dec. 6, 2010)

Micheal Salem, Salem Law Offices (Mark Barrett with him on the briefs), Norman, Oklahoma, for Plaintiff-Appellant.

Richard C. Smith, Assistant Municipal Counselor (Kenneth Jordan, Municipal Counselor, with him on

the briefs), Oklahoma City, Oklahoma, for Defendant-Appellee.

Before **MURPHY, McKAY**, and **TYMKOVICH**, Circuit Judges.

McKAY, Circuit Judge.

In 1983, Plaintiff David Bryson was convicted of a rape and kidnapping he did not commit. At his trial, a forensic chemist employed by the Oklahoma City Police Department, Joyce Gilchrist, testified the hair and, semen found at the scene of the crime were consistent with samples taken from Plaintiff. Plaintiff was incarcerated for seventeen years before his conviction was vacated based on exculpatory DNA test results, and it took another three and a half years before the charges against him were finally dismissed. A subsequent analysis of the serological and hair evidence that was tested before his criminal conviction demonstrated that, even without the benefit of DNA testing, Ms. Gilchrist should have excluded Plaintiff as a criminal suspect back in 1983. Indeed, Ms. Gilchrist's own lab results indicated Plaintiff could not be the donor of the semen found at the scene, contrary to the testimony she gave at his trial.

Following the dismissal of the criminal charges against him, Plaintiff filed this § 1983 action to seek damages against, inter alia, Ms. Gilchrist and the city

that employed her for twenty-one years. Plaintiff ultimately obtained a $16.5 million judgment in actual damages against Ms. Gilchrist. However, the district court granted summary judgment to the City of Oklahoma City, holding that the undisputed evidence, taken in the light most favorable to Plaintiff, did not support a finding of municipal liability.

During the pendency of the action, Ms. Gilchrist filed an indemnification cross-claim against the City. Plaintiff sought to participate in this cross-claim, but Ms. Gilchrist and the City settled the claim for $23,364.29 without his participation. Plaintiff also attempted to seek indemnification directly from the City, but the district court denied his motion.

On appeal, Plaintiff challenges both the entry of summary judgment in favor of the City and the district court's denial of his indemnification application.

DISCUSSION

We review the district court's summary judgment decision de novo, applying the same legal standard as the district court. *See Padhiar v. State Farm Mut. Auto. Ins. Co.*, 479 F.3d 727, 732 (10th Cir. 2007). Under this standard, summary judgment is only warranted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). We also review de novo

the district court's interpretation of Oklahoma's indemnification statute. *See Breaux v. Am. Family Mut. Ins. Co.*, 554 F.3d 854, 863 (10th Cir. 2009).

As an initial matter, we must decide what evidence is properly before us on appeal. After the district court made its summary judgment ruling in this case, Plaintiff filed a motion to reconsider and new supporting evidence in the form of affidavits from two state forensic chemists. The district court denied the motion to reconsider, stating that it would be improper to reconsider the summary judgment decision based upon new supporting facts that should have been presented in prior briefing.

We are not persuaded this decision constituted an abuse of discretion. *See Price v. Philpot*, 420 F.3d 1158, 1167-68 (10th Cir. 2005) (noting that "a district court may, in its discretion, elect not to consider a delayed affidavit" and finding no abuse of discretion in the district court's refusal to consider evidence that was first filed as an attachment to the plaintiff's motion to reconsider). We therefore will not consider any of the new evidence presented for the first time in Plaintiff's motion to reconsider. *See Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224 (10th Cir. 2008); *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) ("[A]lthough our review is de novo, we conduct that review from the perspective of the district court at the time it made its ruling, ordinarily limiting our review to the materials adequately brought to the attention of the district court by the parties.").

We thus consider, in light of the evidence presented to the district court before the entry of its summary judgment decision, whether Plaintiff has set forth sufficient evidence to support a finding of municipal liability against the City of Oklahoma City. As we have previously explained:

> A municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff. Rather, to establish municipal liability, a plaintiff must show 1) the existence of a municipal policy or custom, and 2) that there is a direct causal link between the policy or custom and the injury alleged.

Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir. 1993) (citation omitted). A municipal policy or custom may take the form of (1) "a formal regulation or policy statement"; (2) an informal custom "amoun[ting] to 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law' "; (3) "the decisions of employees with final policymaking authority"; (4) "the ratification by such final policymakers of the decisions – and the basis for them – of subordinates to whom authority was delegated subject to these policymakers' review and approval"; or (5) the "failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189-90

(10th Cir. 2010) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) and *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989)) (internal quotation marks omitted).

On appeal, Plaintiff mainly relies on the last of these potential grounds for municipal liability. Specifically, he argues the City failed to ensure that Ms. Gilchrist was properly trained at the onset of her career and then failed to provide meaningful supervision or additional training during her twenty-one-year tenure in the police department's forensic lab. The evidence suggests the City may well have been deficient in training and supervising Ms. Gilchrist. Nevertheless, the City cannot be held liable for its failure to train or supervise its forensic chemists unless the City's policymakers "can reasonably be said to have been deliberately indifferent to the need" for further training or supervision. *City of Canton*, 489 U.S. at 390. We discussed this requirement of deliberate indifference in *Barney v. Pulsipher*:

> The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights

> is a highly predictable or plainly obvious consequence of a municipality's action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations.

143 F.3d 1299, 1307-08 (10th Cir. 1998) (internal quotation marks and citations omitted).

We conclude Plaintiff has not presented sufficient evidence to support a finding of deliberate indifference. According to the undisputed evidence presented to the district court, the City had not yet received any complaints or criticisms of any of its forensic chemists' work at the time Ms. Gilchrist concealed exculpatory evidence and falsified her test reports in 1983. Plaintiff argues we can find municipal liability despite the City's lack of contemporaneous notice of problems in the forensic laboratory because Ms. Gilchrist's wrongful actions were a highly predictable or plainly obvious consequence of the relatively short technical training period and lack of meaningful supervision for the City's forensic chemists. We are not persuaded, however, that it was highly predictable or plainly obvious that a forensic chemist would decide to falsify test reports and conceal evidence if she received only nine months of on-the-job training and was not supervised by an individual with a background in forensic science. *Cf. Barney*, 143 F.3d at 1308 ("Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting

inmates is inappropriate behavior."). Moreover, although the record reflects that most forensic laboratories began adopting better training and management practices in the 1970s and early 1980s, such practices were by no means universal in 1983, further militating against the conclusion that it was highly predictable or plainly obvious in 1983 that the training and supervision practices employed by the City and other jurisdictions would result in the violation of federal rights.

Plaintiff argues we can infer deliberate indifference in 1983 based on the City's prolonged failure to take any remedial or investigatory actions even after criticisms of Ms. Gilchrist began coming to light in 1986, as well as the ease of implementing quality controls to prevent her wrongful actions. However, although this evidence may show that the City later acted with deliberate indifference to Ms. Gilchrist's subsequent misdeeds, it is irrelevant to the material question before us – whether the City consciously or deliberately chose in 1983 to ignore a risk of harm which the City had been put on notice of either by a past pattern of wrongful acts or by the high predictability that wrongful acts would occur. On that question, we find no evidence to support Plaintiff's claim.

Plaintiff also argues that, regardless of whether the City acted or failed to act with deliberate indifference in 1983, the City can be held liable for malicious prosecution based on its failure to take any actions against Ms. Gilchrist after 1986. Specifically, Plaintiff argues that, had the City taken appropriate actions

to discipline or constrain Ms. Gilchrist's actions after the City was put on notice of her shortcomings in 1986, she would not have been in a position to falsely tell his attorney in 1985 that the evidence had been destroyed and the flaws in her analysis of the forensic evidence in his case would have been more likely to come to light at an earlier time. He thus argues the City is responsible for his wrongful continued confinement in the years following this notice. We conclude, however, that the link between the City's alleged failure to meaningfully supervise Ms. Gilchrist's work after 1986 and the constitutional injury suffered by Plaintiff is too attenuated to support a finding of municipal liability.

Plaintiff further suggests the City may be found liable under the ratification basis for municipal liability, citing to evidence that police supervisors promoted Ms. Gilchrist in the face of repeated criticisms of her work and commended her "dedication and professionalism" in "contributi[ng] to the judicial process." (Appellant's App. at 3093.) However, a municipality will not be found liable under a ratification theory unless a final decisionmaker ratifies an employee's specific unconstitutional actions, as well as the basis for these actions. According to the undisputed evidence in the record, no decisionmakers for the City learned of any defects in the forensic analysis in Plaintiff's case until 2001, when these defects began to come to light during the investigation of Ms. Gilchrist's work that ended in the termination of her employment. Where the City was not even aware of

Ms. Gilchrist's unconstitutional actions with respect to Plaintiff, it cannot be found liable under a ratification theory, despite its general commendation of Ms. Gilchrist's work. Moreover, none of the evidence in the record suggests the City ratified Ms. Gilchrist's falsification of her test results and concealment of exculpatory evidence regarding Plaintiff once the City learned of these particular actions.

Finally, Plaintiff argues the City may be found liable based on its alleged custom of encouraging forensic chemists to manipulate evidence in order to obtain convictions. For support, Plaintiff cites to testimony from a former Oklahoma City police chief that forensic chemists, like "everybody who is on the prosecution team, [will] testif[y] in a way that is the most incriminating." (Appellant's App. at 2829.) Plaintiff also cites to the 1987 statement of a forensic chemist who criticized Ms. Gilchrist's trial testimony from several cases. After charging Ms. Gilchrist with making statements that were subjective and not supported by the science, this chemist stated: "This situation is obviously not going to cure itself – the situation has apparently existed for a number of years, it persists and is condoned by much of the criminal justice system in Oklahoma County." (*Id.* at 3908.) Reviewing these statements in context, we conclude that, even taken in the light most favorable to Plaintiff, they do not establish a custom upon which municipal liability may be based. In context, the police chief's statement suggests, at most, that the City condoned chemists presenting their actual

forensic findings in the most damning way possible – not that the City encouraged chemists to fabricate test results. As for the other chemist's statement, his specific criticisms were limited to Ms. Gilchrist. Although he asserted that the prosecutor and others condoned Ms. Gilchrist's misleading testimony, he did not suggest that any City chemists or employees besides Ms. Gilchrist were giving similarly inaccurate testimony. Even taking all of the evidence in the light most favorable to Plaintiff, we are not persuaded the evidence is sufficient to give rise to an inference of a widespread City practice of fabricating results and concealing evidence that was "so permanent and well settled as to constitute a custom or usage with the force of law," *Praprotnik*, 485 U.S. at 127 (internal quotation marks omitted). We thus hold that the district court properly granted summary judgment to the City on Plaintiff's municipal liability claims.

We turn now to Plaintiff's argument that he is entitled to monetary damages from the City based on Oklahoma's governmental employee indemnification statute. This statute provides in relevant part that political subdivisions in the state "shall: 1. Provide a defense for any employee" accused of committing a constitutional violation while acting within the scope of employment and "2. Pay . . . any judgment entered . . . against any employee . . . , and any costs or fees, for a violation of property rights or any rights, privileges, or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of employment."

Okla. Stat. tit. 51, § 162(A). The statute further provides:

> All applications for indemnification from the state or a political subdivision shall be filed in the name of the real party or parties in interest, and in no event shall any application be presented nor recovery made under the right of subrogation. . . . The employee of the state or a political subdivision must file an application for indemnification within thirty (30) days of final judgment, or the right to seek indemnification shall be lost forever.

Id. § 162(B)(3). The statute also explains that a "political subdivision shall not be required to indemnify any employee . . . , unless the employee is judicially determined to be entitled to such indemnification and a final judgment therefor is entered." *Id.* § 162(B)(1).

Plaintiff argues he is the real party in interest under this section because he would be entitled to the benefits of any successful indemnification action. He argues that, as the real party in interest, he was entitled to participate in any hearings or settlement negotiations on the indemnification claim, and moreover, that he was entitled to seek indemnification directly from the City.

In the unpublished case of *Lampkin v. Little*, 85 F. App'x 167 (10th Cir. 2004), we rejected the argument that an injured party can be substituted for a tortfeasor employee as the real party in interest under this Oklahoma statute. We concluded that "the

primary purpose of § 162 is not to ensure that a wronged plaintiff is compensated, but to relieve an employee of the burden of paying a judgment should he meet the statutory prerequisites." *Id.* at 169; *see also Lampkin v. Little*, 286 F.3d 1206, 1212 (10th Cir. 2002) ("Finally, a policy of indemnification aims to lessen the burdens of personal liability that employees may face as a result of their acts as employees."). We noted that an indemnification award, if the entitlement to one is proven, will be paid to the employee and not the prevailing plaintiff. *Lampkin*, 85 F. App'x at 170. We reasoned that an injured party is only an incidental beneficiary of the statute and is therefore not entitled under Oklahoma law to require a municipality to indemnify its employee. *Id.* Thus, the municipality "is not the insurer of the judgment" and "has no constitutional or statutory obligation to ensure that a prevailing party receives the jury's award." *Id.* at 170. We therefore agreed with the district court that the prevailing plaintiff had no standing to pursue the employee's indemnification application on his own behalf. *Id.*

Plaintiff argues this unpublished opinion was wrongly decided. He argues that, contrary to our conclusions in *Lampkin*, Oklahoma's statute is remedial and was intended to benefit injured plaintiffs as well as governmental employees. Plaintiff cites to no authority to support this proposition, however. Nor has Plaintiff set forth any persuasive arguments or authorities to dispute our previous conclusion that an indemnification award under the Oklahoma statute

will be paid to the employee, not to the prevailing plaintiff. Plaintiff argues two of our sister circuits have allowed a prevailing plaintiff to obtain indemnification payments directly from municipalities. *See Yang v. City of Chicago*, 137 F.3d 522, 525-26 (7th Cir. 1994); *Skevofilax v. Quigley*, 810 F.2d 378, 385 (3d Cir. 1987). However, *Yang* involves a statute quite dissimilar to the Oklahoma statute at issue in this case, while *Skevofilax* relates to a contractual indemnification clause that the defendant employees, as well as the prevailing plaintiffs, were attempting to enforce against the municipality. In contrast to the Oklahoma statute, the relevant provisions in these cases did not require the application for indemnification to be filed by the municipal employee, nor did they provide that the municipality was not required to indemnify an employee unless the employee was judicially determined to be entitled to indemnification. Neither of these cases persuades us that we misinterpreted the Oklahoma statute in our unpublished *Lampkin* decision. Thus, following the reasoning set forth in *Lampkin*, we hold that Plaintiff is not the real party in interest on Ms. Gilchrist's indemnification cross-claim and was not entitled to participate in the indemnification decision nor to seek an indemnification award from the City on the judgment he obtained against Ms. Gilchrist.

CONCLUSION

We are sympathetic to Plaintiff's plight and find it deplorable that the conditions that led to his unjust

confinement were permitted to continue for so long a time after the City was put on notice of the deficiencies in its forensic laboratory program. Nevertheless, we see no basis in the summary judgment record for holding the City liable in this case. Nor do we see any basis under Oklahoma law for permitting Plaintiff to invoke the governmental employee indemnification statute on his own behalf. We therefore **AFFIRM** the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID JOHNS BRYSON,	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-05-115-F
ROBERT H. MACY, individually, et al.,	)	
	)	
Defendants.	)	

ORDER

(Filed Aug. 17, 2009)

Before the court is Plaintiff David Johns Bryson's Application for Indemnification (doc. no. 195), filed July 8, 2009. Defendant, City of Oklahoma City, has responded to the application and plaintiff, David Johns Bryson, has replied. Upon due consideration of the parties' submissions, the court makes its determination.[1]

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[1] On August 12, 2009, plaintiff filed a Motion to Reopen Proceedings for Determination of Plaintiff's Indemnification Application (doc. no. 210), wherein plaintiff requests the court to reopen these proceedings to consider his indemnification application. The court concludes that it may address plaintiff's application without reopening these proceedings. The court therefore concludes that plaintiff's motion should be denied.

Background

On September 30, 2005, plaintiff, David Johns Bryson ("Bryson"), commenced this action seeking damages under 42 U.S.C. § 1983 against defendants, City of Oklahoma City ("City") and Joyce Gilchrist ("Gilchrist"), for malicious prosecution and for bad faith denial of post-conviction access to potentially exculpatory evidence. Both of the claims arose under the Fourteenth Amendment. Bryson also sought damages under Oklahoma state tort law against Gilchrist.[2]

On March 21, 2007, Gilchrist filed an answer to Bryson's complaint. Along with her answer, Gilchrist filed a cross-claim against defendant, City of Oklahoma City ("City"), seeking indemnification from the City, pursuant to 11 O.S. § 23-101 and 51 O.S. § 162, for damages, fees and costs and a defense.

On April 10, 2007, the City filed an answer denying that Gilchrist was entitled to indemnification.

On April 30, 2009, the court entered an order addressing the motions for summary judgment filed by the City and Gilchrist, challenging Bryson's claims. The court granted the City's motion and

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[2] In his complaint, Bryson also sought relief against other defendants. Those defendants, however, are not relevant to the court's analysis of Bryson's indemnification application. Thus, the court need not identify the defendants or the claims against them.

denied Gilchrist's motion. In the order, the court found that neither the City nor Gilchrist had addressed Gilchrist's cross-claim in their motions and concluded that the cross-claim remained pending for resolution.

After receipt of an inquiry from counsel for the City as to whether the final pretrial order should contain a reference to Gilchrist's indemnification cross-claim, the court entered an order on May 7, 2009, concluding that the final pretrial order must include the cross-claim. The court stated that the final pretrial report, if approved, would supersede the pleadings. In its order the court also directed Gilchrist and the City to address the cross-claim in their trial briefs.

On May 26, 2009, Bryson filed a Motion to Permit Participation in Indemnification Hearing or Trial, wherein Bryson sought permission to participate in any indemnification proceeding or trial involving the question of whether the City is required to indemnify Gilchrist.

On May 26, 2009, the parties filed a final pretrial report. Bryson submitted a brief preliminary statement which included his position that he was entitled to be heard regarding indemnification issues. Bryson also stated, in the jurisdiction section of the final pretrial report, that the court has supplemental jurisdiction over the indemnification issues under 28 U.S.C. § 1367. In its brief preliminary statement, the City indicated that the indemnification issue was

only as between Gilchrist and the City. It stated that jurisdiction for Gilchrist's claim was invoked under 28 U.S.C. § 1367 and 51 O.S. § 162.

On June 3, 2009, at a settlement conference conducted by United States Magistrate Judge Robert E. Bacharach, Bryson and Gilchrist reached a settlement agreement as to Bryson's claims against Gilchrist. This resolution included the entry of judgment in favor of Bryson and against Gilchrist.

On June 4, 2009, Bryson and Gilchrist filed a joint motion seeking the entry of judgment as part of the settlement agreement. The court granted the joint motion on June 8, 2009. In its June 8th order, the court expressly determined, pursuant to Rule 54(b), Fed. R. Civ. P., that there was no just reason for delay of entry of a final judgment as to Bryson's action against Gilchrist and directed that judgment in favor of Bryson and against Gilchrist be entered as a final judgment and that the judgment be effective as of the date of the judgment's entry.

On June 8, 2009, judgment was entered in favor of Bryson and against Gilchrist "in the amount of $16,500,000.00 in actual damages for violation of Bryson's constitutional rights of due process under the Fourteenth Amendment of the Constitution of the United States, plus post-judgment interest thereon in the amount of 0.49% per annum from this date, plus the costs of this action." *See*, Judgment (doc. no. 181).

On June 15, 2009, the City filed an objection to Bryson's motion to permit his participation in the

indemnification hearing or trial. The City asserted, *inter alia*, that Bryson was not authorized to participate in any indemnification proceeding.

On June 17, 2009, the court entered an order denying Bryson's motion to reconsider the court's order granting summary judgment in favor of the City as to Bryson's claims against it. Contemporaneous with the June 17th order, the court entered a separate order expressly determining pursuant to Rule 54(b) that there was no just reason for delay of a final judgment as to Bryson's action against the City and directing the entry of final judgment as to Bryson's action against the City and that the final judgment be effective as of the date of its entry. The court then entered a Rule 54(b) Judgment in favor of the City as to Bryson's action against it.

Upon entry of the Rule 54(b) judgment in favor of the City, the only remaining claim in the action was Gilchrist's indemnification cross-claim against the City. However, the court had been advised by Magistrate Judge Bacharach that Gilchrist and the City had reached a settlement of the cross-claim. The settlement had to be approved by the City Council, but counsel for the City were confident it would be approved. In light of the settlement of the cross-claim, the court entered an order on June 17, 2009 directing the clerk of the court to administratively close the action for 60 days.

On July 8, 2009, Bryson filed the instant application for indemnification.

On July 22, 2009, Gilchrist and the City filed a stipulation of dismissal with prejudice of all of Gilchrist's claims against the City, pursuant to Rule 41, Fed. R. Civ. P. At the request of the parties, the court entered an order that same day ordering the dismissal with prejudice of Gilchrist's claims against the City.

Discussion

As previously stated, Bryson filed a motion to permit his participation in any indemnification proceeding or trial involving the issue of whether the City is required to indemnify Gilchrist. In the final pretrial report, which to date has not been formally approved by the court, Bryson also sought to be heard on Gilchrist's indemnification cross-claim. With the dismissal with prejudice on July 22, 2009 as to Gilchrist's "claims" against the City, which dismissal with prejudice includes the indemnification cross-claim alleged in this action, the court concludes that there is no indemnification cross-claim for which any indemnification hearing or any trial is to be held. There is no reason to allow Bryson to participate in any indemnification proceeding or trial or to allow Bryson to be heard with respect to Gilchrist's indemnification cross-claim. Therefore, Bryson's motion to permit his participation in any indemnification proceeding or trial is denied as moot.

In the instant application for indemnification, Bryson no longer seeks to be heard as to Gilchrist's cross-claim, rather, he seeks for himself an indemnification judgment against the City in his favor in the amount of $10,000,000. *See,* Bryson's application, p. 1. The court concludes that Bryson, as the prevailing party with respect to Bryson's action against Gilchrist, may not invoke the Oklahoma Governmental Tort Claims Act ("GTCA"), 51 O.S. 2001 § 151, *et seq.*, specifically, 51 O.S. § 162, on his own behalf. *Lampkin v. Little,* 85 Fed. Appx. 167 (10th Cir. Jan. 7, 2004).[3] The court also finds that Bryson is not entitled to indemnification under Article IV, Section 2323 of the Oklahoma City Municipal Codes because that provision does nothing more than establish higher limits for indemnification for civil rights claims for individual employees. Bryson is not an employee of the City.

Based upon the foregoing, Plaintiff David Johns Bryson's Motion to Reopen Proceedings for Determination of Plaintiffs Indemnification Application (doc. no. 210), filed August 12, 2009, is **DENIED**. Plaintiff David Johns Bryson's Motion to Permit Participation in Indemnification Hearing or Trial (doc. no. 172), filed May 26, 2009, is **DENIED** as moot. Plaintiff David Johns Bryson's Application for Indemnification (doc. no. 195), filed July 8, 2009, is **DENIED**.

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[3] Unpublished opinion cited as persuasive under 10th Cir. R. 32.1(A).

So ordered this 17th day of August, 2009.

/s/ Stephen P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID JOHNS BRYSON,	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-05-115-F
ROBERT H. MACY, individually, et al.,	)	
	)	
Defendants.	)	

ORDER

(Filed Jun. 17, 2009)

Before the court is Plaintiff David Johns Bryson's Motion to Reconsider Order of Summary Judgment Regarding City of Oklahoma City, filed May 14, 2009 (doc. no. 162). Defendant, City of Oklahoma City, has responded to the motion and plaintiff has replied. Upon due consideration of the parties' submissions, the court makes its determination.

On April 30, 2009, the court entered an amended order addressing the pending motions for summary judgment. The court granted summary judgment in favor of defendant City of Oklahoma City (herein: the City) as to the claims of plaintiff, David Johns Bryson. The court also granted summary judgment in favor of defendant Robert Macy, as to the claims he challenged in his motion. Defendant Robert Macy had not challenged plaintiff's state law claim against him and that claim remained for trial. The court denied summary judgment as to plaintiff's claims against

defendant Joyce Gilchrist. The court further found that defendant Joyce Gilchrist's cross-claim against the City remained at issue.

In the amended order, the court did not direct entry of judgment under Rule 54(b), Fed. R. Civ. P., in favor of the City as to plaintiff's claims against it (and the City did not request the entry of judgment after the amended order was entered.)

Within ten days of the filing of the amended order, plaintiff filed the instant motion. Initially, in its motion, plaintiff contends that the court's order is an interlocutory ruling, not a final judgment and is thus subject to the court's general discretionary authority to further review and revise an interlocutory ruling. Because it is an interlocutory ruling, plaintiff asserts that the court is not obligated to reconsider the ruling under the standards applicable for altering or amending a judgment under Rule 59(e), Fed. R. Civ. P., or for granting relief from judgment under Rule 60(b), Fed. R. Civ. P.

The City, on the other hand, maintains that the standards of Rule 59(e) and Rule 60(b) do apply to plaintiff's motion and plaintiff's motion should be denied as it fails to address the Rule 59(e) and Rule 60(b) standards. The City contends that plaintiff's motion fails under those standards and that it should consequently be denied.

The court concludes that the strict standards of Rule 59(e) and Rule 60(b) do not apply to plaintiff's motion. The court's ruling was not a final order or

judgment. The amended order did not adjudicate all claims or the rights and liabilities of all parties. The court also did not direct the entry of a final judgment under Rule 54(b) in favor of the City as to plaintiff's claims against it. Consequently, pursuant to Rule 54(b), the court's order "may be revised at any time before entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *See,* Rule 54(b), Fed. R. Civ. P.; *see also, Price v. Philpot,* 420 F.3d 1158, 1167 n. 9 (10th Cir. 2005) ("'every order short of a final decree is subject to reopening at the discretion of the district judge'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 12 (1983)). Therefore, as urged by plaintiff, the court considers plaintiffs motion as "an interlocutory motion invoking the district court's general discretionary authority to review and revise interlocutory rulings prior to entry of final judgment." *Fye v. Oklahoma Corp. Com'n,* 516 F.3d 1217, 1224 n. 2 (10th Cir. 2008).

While the court has the discretion to revise its amended order, the court declines to exercise its discretion in this case. Plaintiff's motion seeks to raise new arguments which were not raised in his 49 page response to the City's summary judgment motion or in his responses to Macy's and Gilchrist's summary judgment motions (totaling 56 pages), which parallel responses were incorporated into his response to the City's motion. *See,* doc. no. 118, p. 1, n. 1. The court concludes that these new arguments, which could have been advanced in prior briefing, do

not provide an appropriate basis for reconsidering the court's amended order. *See, Van Skiver v. U.S.*, 952 F.2d 1241, 1243 (10th Cir. 1991) (advancing new arguments which were otherwise available for presentation when the original summary judgment motion was briefed is not appropriate). Plaintiff is seeking a second bite at the summary judgment apple based on arguments and authorities that could and should have been presented in its response to the City's summary judgment motion.

Plaintiff's motion also seeks to present new supporting facts through the affidavits of Donald A. Flynt and Ann Reed. Plaintiff, however, fails to explain why the testimony of these affiants could not have been presented in prior briefing. The court concludes that advancing new supporting facts, available at the time of the prior summary judgment briefing, is not appropriate. *Van Skiver,* 952 F.2d at 1243. Plaintiff's motion likewise presents supporting facts through the deposition of William Citty, the former Chief of Police of Oklahoma City. Although the deposition was taken after the parties' briefing was completed, plaintiff fails to explain why he did not seek to supplement the summary judgment record with this evidence. The court concludes that it is not proper to reconsider its amended order based upon testimony from Mr. Citty which could have been presented before the court ruled on the City's motion. *Id.*

Plaintiff's motion also seeks to revisit issues that the court addressed and adjudicated in its amended

order. The court finds that revisiting issues already addressed "is not the purpose of a motion to reconsider." *Van Skiver,* 952 F.2d at 1243 (quotation omitted).

Accordingly, Plaintiff David Johns Bryson's Motion to Reconsider Order of Summary Judgment Regarding City of Oklahoma City, filed May 14, 2009 (doc. no. 162), is **DENIED**.

So ordered this 17th day of June, 2009.

/s/ Stephen P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

611 F.Supp.2d 1234

United States District Court,

W.D. Oklahoma.

David Johns BRYSON, Plaintiff,

v.

Robert H. MACY, individually, et al., Defendants.

No. CIV-05-1150-F.

April 30, 2009.

Mark H. Barrett, Mark H. Barrett Law Office, Micheal C. Salem, Salem Law Offices, Norman, OK, for Plaintiff.

John M. Jacobsen, District Attorney's Ofc., Melvin C. Hall, Riggs Abney Neal Turpen Orbison Lewis, Amanda B. Carpenter, Richard C. Smith, Municipal Counselor's Office, Oklahoma City, OK, for Defendants.

AMENDED ORDER

STEPHEN P. FRIOT, District Judge.

Before the court are Defendant City of Oklahoma City's Motion for Summary Judgment, filed January 8, 2009 (doc. no. 105), Defendant Robert H. Macy's Motion for Summary Judgment, filed January 9, 2009 (doc. no. 107), and the Motion for Summary Judgment by Defendant, Joyce Gilchrist, filed January 9, 2009 (doc. no. 110). Upon due consideration of the parties' submissions, the court makes its determination.

I. *Background*

Plaintiff, David Bryson, spent over 17 years in prison for crimes – kidnaping, rape and sodomy – that he did not commit. Plaintiff seeks damages under 42 U.S.C. § 1983 against defendants, City of Oklahoma City, Joyce Gilchrist, and Robert Macy, for malicious prosecution and for bad faith denial of post-conviction access to potentially exculpatory evidence. Both of these claims arise under the due process clause of the Fourteenth Amendment. Plaintiff also seeks damages under Oklahoma state tort law against defendants Joyce Gilchrist and Robert Macy. All defendants seek summary judgment as to plaintiff's § 1983 claims. Defendant, Joyce Gilchrist, seeks summary judgment as to plaintiff's state law claim.

II. *Standard of Review*

Under Rule 56(c), Fed.R.Civ.P., summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of a material

fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). All reasonable inferences to be drawn from the undisputed facts are to be determined in a light most favorable to the non-movant. *United States v. Agri Services, Inc.*, 81 F.3d 1002, 1005 (10th Cir.1996). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there is a genuine issue for trial. *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.1983).

III. *Relevant Facts*

The facts, undisputed or viewed in a light most favorable to plaintiff, are as follows.

A. *Plaintiff's Conviction*

On September 23, 1982, Theresa Taylor, a 23 year-old, was kidnapped in downtown Oklahoma City and driven to a remote location in the southeast part of town. During the drive, she was forced to perform an act of fellatio. Upon arrival at the remote location, Ms. Taylor was dragged out of the car into a muddy ravine. The assailant, who carried a knife, then raped and orally and anally sodomized Ms. Taylor. City's Ex. 17, pp. 3-23; City's Ex. 18, pp. 36-66.

Thereafter, the assailant ordered Ms. Taylor to perform another act of fellatio. When she felt the assailant becoming erect, Ms. Taylor "bit down very hard, and as hard [she] could" on his penis. She "felt blood come into [her] mouth." City's Ex. 18, p. 61, ll. 7-9. The assailant screamed and dropped the knife he was holding. Through clinched teeth, she ordered the assailant to his side and ordered him to put his hands underneath his side so they could not reach the knife. *Id.* at p. 61, ll. 10-19. She bit the assailant's penis one more time and took off running. *Id.* at p. 62, ll. 2-5.

Ms. Taylor ran nude to the home of Air Force Major and Mrs. Kuritz. Mrs. Kuritz gave her a robe and Major Kuritz called the police. City's Ex. 17, p. 27, ll. 1-3; City's Ex. 18, p. 64, ll. 2-10. Ms. Taylor was interviewed briefly by the police and taken by ambulance to Oklahoma Memorial Hospital, where she was examined by Dr. Suzanne Bergen. City's Ex. 18, p. 64, ll. 11-24.

Detective Julie Smith was assigned to Ms. Taylor's case. Detective Smith had Ms. Taylor assist a sketch artist in providing a drawing of the assailant. A radiogram was issued giving a description of the suspect, the clothing worn and information that the suspect had been bitten on the penis. City's Ex. 18, p. 226, ll. 22-25; City's Ex. 87; City's Ex. 22.

On September 24, 1982, evidence collected from Ms. Taylor and the crime scene was submitted to the OCPD forensic laboratory. The evidence collected

from Ms. Taylor included a vial of blood, oral washing, vaginal aspirate, saliva sample, two vaginal swabs (posterior fornix), two vaginal swabs (cervix), vaginal slide, two rectal canal swabs, rectal canal slide, scalp hairs, pubic hair combing, pulled pubic hairs, two swabs from bite area – right arm, fingernail scraping, leaves and grass taken from victim's hair, one torn fingernail and one robe. The evidence from the crime scene included one torn brown skirt, one brown belt, one beige blouse, one white bra and a paper "bindle" containing hairs. City's Ex. 29.

On September 27, 1982, Detective Smith requested the Oklahoma City Police Department ("OCPD") forensic laboratory to analyze the evidence. Defendant, Joyce Gilchrist ("Gilchrist"), a forensic chemist for the OCPD, was assigned the case. The case number was "ST-82-336." City's Ex. 20; City's Ex. 17, p. 103, ll. 9-10; City's Ex. 29.

On the same day, Detective Smith requested a group of rape crisis volunteers to contact every medical facility in the metropolitan area and give a description of the suspect and a brief synopsis of the injuries that the suspect had sustained. City's Ex. 22; City's Ex. 18, p. 231, ll. 8-15.

On October 2, 1982, plaintiff, David Bryson ("Bryson"), called Dr. Patskowsky's office to obtain a prescription for an infected penis. Because Dr. Patskowsky was not working that day, he was referred to Dr. Patskowsky's partner, Dr. Tillinghast. Dr. Tillinghast spoke to Bryson and wrote him two

prescriptions – one for a painkiller and one for an antibiotic. City's Ex. 18, p. 353, 376-77; City's Ex. 21.

Shortly thereafter, Dr. Tillinghast advised the rape crisis group of Bryson's injury. The group then called Detective Smith and advised her of Bryson's injury. City's Ex. 22.

On October 5, 1982, Bryson, who was twenty-eight years old, was arrested for outstanding warrants for various traffic offenses and was held as a suspect in the rape of Ms. Taylor. City's Ex. 24, pp. 9-11, 80-81; City's Ex. 25; City's Ex. 17, p. 54, ll. 7-11. His injured penis was photographed by OCPD officer Ed Johnson. City's Ex. 18, pp. 272-276.

A photographic lineup was prepared by Detective Smith, which included a photograph of Bryson as photograph number 3. City's Ex. 26. Ms. Taylor tapped a photograph below Bryson's photograph and stated that the face was the right shape and the beard looked right but that he was not the man. She continued to look at the lineup and told Detective Smith that number 3 (Bryson) was the man. Bryson's Ex. 90, p. 58, ll. 22-25, p. 59, ll. 1-4.

On October 6, 1982, blood, saliva and hair evidence collected from Bryson was submitted to the OCPD forensic laboratory. City's Ex. 29.

On October 8, 1982, an information was filed in Oklahoma County District Court, Case No. CF-82-5031, charging Bryson with kidnapping, first-degree rape, two counts of oral sodomy and anal sodomy.

On October 15, 1982, evidence collected from Ms. Taylor's fiancé, Daniel Kalina, was submitted to the OCPD forensic laboratory. City's Ex. 29.

James Pearson ("Pearson"), an Oklahoma City attorney, was retained by Bryson's father to represent Bryson in the criminal proceedings. Bryson's Ex. 86, p. 17, ll. 4-25, p. 18, ll. 1-11. On November 10th and 18th, a preliminary hearing was conducted. The prosecution called Ms. Taylor and Detective Smith and rested. Pearson, on behalf of Bryson, moved to dismiss the case for lack of probable cause. The motion was overruled. City's Ex. 17. During his presentation, Pearson called Gilchrist as one of his witnesses. Gilchrist testified that she had not completed her hair comparison analysis but had done some preliminary blood work. After Pearson completed his presentation, the trial court denied a renewed motion to dismiss and Bryson was bound over for trial. *Id.*

On January 10, 1983, a "pot pipe" was submitted to the OCPD forensic laboratory. City Ex. 29.[1]

By January 28, 1983, Gilchrist had finished her forensic work and had written her report. In her report she stated that "[o]ne (1) pubic hair taken from the torn brown skirt (Item # 18) is consistent in

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[1] Ms. Taylor testified at the preliminary hearing and at trial that the assailant forced her to smoke what she believed to be marijuana from a pipe. City's Ex. 17, p. 19, ll. 7-12; City's Ex. 18, p. 48, ll. 24-25, p. 49, ll. 1-3.

microscopic characteristics with the pubic hairs (Item # 31) obtained from David John Bryson, and therefore could have come from Bryson." She also stated that "[o]ne (1) scalp hair taken from the blouse (Item # 20) and three (3) scalp hairs from the crime scene (Item # 22) are consistent in microscopic characteristics with the scalp hairs (Item # 25) obtained from David John Bryson, and therefore, could have come from Bryson." City Ex. 29, p. 4.

In the report, Gilchrist found that Bryson was a ABO blood type B and a secretor. She also found that Ms. Taylor was an ABO blood type O and a secretor.[2] She concluded:

> The majority of seminal stains encountered in case work are as a result of vaginal drainage and therefore will be a mixture of semen and vaginal secretion. When interpreting the results of grouping of these stains, it must be assumed that any blood groups which are consistent with the female did, in fact, originate from her.
>
> Since the rape exam was not done until several hours after the assault, two (2) possibilities must be taken into consideration: 1). That most or all of the seminal fluid may

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[2] A secretor is a person who secretes his or her ABO blood group substances together with H substance into his or her body fluids (*e.g.* semen, saliva, vaginal secretion, etc.). A "B secretor" will secrete B plus H and an "O secretor" will secrete just H. A non-secretor is an individual who does not secrete his ABO blood group substances into other body fluids. Bryson's Ex. 21, p. 4.

have been lost prior to the exam (even though sperm may be present), and 2). That the semen donor is a low level secretor in his seminal fluid.

The semen found in the vaginal aspirate and on the vaginal swaps contain only the H Substance. However, the B substance was detected by the more sensitive absorption-elution test. The B substance was also detected on the rectal swabs. The B and H substances were detected in semen stains from the robe. The H substance therefore, could have originated from the victim (Taylor) and the semen donor is therefore a B secretor. The semen could have originated from Bryson. In this case both Taylor and Bryson are the same PGM type (i.e. 2-1)[3], therefore, no conclusion as to the PGM type of the semen donor can be drawn.

* * *

ABO grouping tests done on the blood and saliva samples obtained from Thomas and Katherine Kuritz show that Thomas is a B secretor and Katherine is an O secretor. Both Thomas and Katherine have the same PGM type (i.e. 2-1). Therefore, the semen stains on the robe could have originated from the

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[3] PGM is Phosphoglucomutase. It is a polymorphic enzyme found in blood and some other body fluids such as semen. Three different forms can be identified: PGM 1, PGM 2-1 and PGM 2. Bryson's Ex. 1, p. A3.

> Kuritz's. However David Bryson can not be excluded as the semen donor.

City's Ex. 29, pp. 3, 4 and 5.

On February 7, 1983, the OCPD forensic laboratory released the evidence to Detective Smith for Barry Albert, the Assistant District Attorney handling Bryson's case. City's Ex. 32. Bryson's trial commenced on that same date. City's Ex. 18.

On the first day of trial, hair evidence was produced to Bryson's expert, Max Courtney ("Courtney"), for examination. Courtney created a chart entitled "Pubic Hair Chart." City's Ex. 33. After the examination, Courtney communicated that he could not help Pearson. City's Ex. 34, pp. 91-92. However, Bryson's pubic hair contained characteristics which were not listed when Courtney charted the known pubic hair of Bryson. Bryson's Ex. 52.

During the trial, Ms. Taylor testified and identified Bryson as the assailant. City's Ex. 18, pp. 96-97. Marge White also testified and identified Bryson as the man whom she had observed hitchhiking on a road near the time and place of the sexual assaults and who had lunged at her vehicle when it approached him. Bryson's Ex. 3, pp. 165-186. In addition, Gilchrist testified consistently with the statements and conclusions in her report. City's Ex. 18, pp. 309-312. She testified that the donor of the semen was a B secretor. *Id.*

After the prosecution rested, Pearson demurred to the evidence and it was overruled. City's Ex. 18, p. 352. Bryson testified that he received an injury to his penis after he requested his girlfriend to scrape her teeth on his penis in an up and down motion. *Id.* at 486. OCPD officer Ed Johnson had described Bryson's injury during the prosecution's case as "abraised" and "skinned." City's Ex. 18, p. 274, ll. 16-18, p. 276, ll. 19-24. Bryson's doctor testified that Bryson's injury was not comparable to the bite injury described by Ms. Taylor. City's Ex. 18, pp. 358-362. Pearson presented evidence of an alibi for Bryson through several witnesses. According to the testimony, Bryson had been at his father's home at 6:30 p.m. and then went directly to a driving school which started no later than 7:05 p.m. City's Ex. 18, pp. 429-463, pp. 470-472, pp. 545-548.

Bryson's trial ended on February 10, 1983 and Bryson was convicted of kidnapping, first-degree rape, two counts of oral sodomy with convictions on all five counts of the information. Bryson was sentenced on March 4, 1983 to a term of 75 years for the first-degree rape and to a term of 10 years each for the remaining counts of kidnapping, oral sodomy and anal sodomy. The 10-year sentences were ordered by the trial court to be run concurrently, but to be served consecutively with the 75 year sentence. City's Ex. 27.

Bryson appealed his convictions. On September 30, 1983, the court reporter filed trial transcripts and "filed exhibits" with the court clerk. City's Ex. 27. The Oklahoma Court of Criminal Appeals ("OCCA")

affirmed the convictions on August 30, 1985. Macy's Ex. 4. Gilchrist is not mentioned in the opinion. However, the opinion states that "[s]erological and hair analysis evidence also linked appellant to the crime." *Id.* Judge Bussey of the OCCA, in a concurring opinion, described the evidence against Bryson as "overwhelming." *Id.*

B. *Denial of DNA Testing*

In April of 1988, Pearson approached Gilchrist about the possibility of DNA testing on the forensic evidence in Bryson's case. Bryson's Ex. 86, pp. 140-142, City's Ex. 47. She informed him that he would have to get approval of the District Attorney's office. Bryson's Ex. 86, p. 140, ll. 12-13. Pearson then talked with Barry Albert, the Assistant District Attorney who prosecuted Bryson's case, and he informed Pearson that he would need to talk with Robert Macy ("Macy"), the District Attorney, or Pat Morgan, the First Assistant District Attorney. City's Ex. 47. Pearson wrote a letter to Mr. Morgan and then talked with Macy personally. City's Ex. 47, Bryson's Ex. 86, p. 141, ll. 4-10. Pearson wanted the evidence tested by Lifecodes. City's Ex. 47. Macy agreed to the testing by Lifecodes and told Pearson to have Gilchrist ship the evidence. Bryson's Ex. 86, p. 148, ll. 15-20.

Pearson contacted Gilchrist and told her he "wanted to send everything that could be sent for DNA testing." Bryson's Ex. 86, pp. 140, l. 25, p. 141,

l. 1. Gilchrist responded that "it had been destroyed." *Id.* at p. 141, ll. 2-3. Gilchrist wrote a note, dated June 6, 1988, referencing "ST-82-336," which stated: "This evidence has been destroyed as per S.O.P. and therefore, we have nothing left with which to do DNA analysis on as requested by Def Atty Jim Pearson." City's Ex. 48. Pearson spent an afternoon looking for evidence in the court reporter's storage area but did not find anything. City's Ex. 34, pp. 143-147.

In December 1989, Marlene Cannon, a private investigator hired by Bryson's father, found the forensic evidence from Bryson's trial in the District Court clerk's office and inventoried the evidence present. City's Ex. 51. On December 4, 1989, Ms. Cannon obtained a court order allowing her access to items 11 & 12 in the rape kit to "examine them." City's Ex. 27. Cannon advised Bryson's father of the forensic evidence found and provided a list of the evidence by letter dated January 1, 1990. City's Ex. 51.

In May 1991, Bryson's new attorney, Jack Pointer, made a request of the Assistant District Attorney that Bryson be allowed access to the forensic evidence for DNA testing, and the request was denied. City's Ex. 53, p. 27, l. 1-10; p. 85, ll. 6-15.

On January 17, 1992, Jack Pointer wrote a letter to the court clerk requesting him to preserve all evidence in Bryson's case. He advised that he would be filing in the near future a petition for post-conviction relief. City's Ex. 55.

C. *Post-Conviction Proceedings*

On September 7, 1995, Bryson filed an application for post-conviction relief in the District Court. City's Ex. 56. In the application, Bryson stated that the testimony of Gilchrist was a significant factor resulting in his conviction. He stated that the hair and blood evidence could be subjected to DNA testing which would conclusively prove that Bryson did not commit the acts for which he was convicted. He stated that he would be asking the court to allow an evidentiary hearing and to transport the samples to the DNA lab for analysis. *Id.* The Assistant District Attorney responded to the motion and argued that it should be denied. City's Ex. 27; Complaint, ¶ 51. The District Court denied the application in an order filed November 20, 1995. City's Ex. 57; City's Ex. 27. Mr. Pointer failed to file a petition in error with the OCCA within the time provided by law and the appeal was dismissed. City's Ex. 58.

When Mr. Pointer failed to respond to telephone calls, Bryson's father consulted attorney Jack Fisher ("Fisher"). Fisher discovered that the appeal had been dismissed. In August, 1996, Bryson's father retained Fisher to pursue obtaining the forensic evidence for DNA testing. City's Ex. 59; Bryson's Ex. 87, p. 6, ll. 20-22, p. 266, ll. 11-12.

After being retained, Fisher called Gilchrist and she told him the evidence was on her window sill in her office and that she had been directed to destroy it. Fisher told Gilchrist not to destroy it that he wanted

to test it. Bryson's Ex. 87, p. 7, ll. 7-14. On August 28, 1996, Fisher sent Gilchrist a letter and requested that the evidence be preserved for future DNA testing. City's Ex. 61. On September 6, 1996, Gilchrist wrote a note for "ST-82-336" which stated: "As per ADA S. Stensaas, I can ignore this request. The attorney must make any request through the DA's office." City's Ex. 62. Fisher had a conversation with Assistant District Attorney, Susan Stensaas, about DNA testing and she told him that she "would go to jail before she would allow DNA testing." Bryson's Ex. 87, p. 285, ll. 12-21.

On September 12, 1996, Fisher, on behalf of Bryson, filed an application with the District Court for access to the forensic evidence for DNA testing at Bryson's expense. City's Ex. 63.

On September 23, 1996, Gilchrist made a handwritten list for "ST-82-336" of "Evidence Returned from DA's storage to Serology." City's Ex. 64.

On October 2, 1996, a hearing was held on Bryson's application for access to evidence for DNA testing. City's Ex. 65. The District Court denied Bryson's application on the basis of res judicata. The court, however, ordered that the forensic evidence be retained. City's Ex. 67.

On October 10, 1996, Bryson filed a motion for an appeal out of time with the OCCA concerning the dismissed appeal of the District Court's November 20, 1995 order denying post-conviction relief. The motion was granted. City's Ex. 69.

On October 31, 1996, Bryson filed a Petition for a Writ of Mandamus with the OCCA directing the District Court judge to allow Bryson access to the forensic evidence for DNA testing. City's Ex. 70.

On March 4, 1997, the OCCA affirmed the District Court's November 20, 1995 order denying post-conviction relief. The court concluded that "at this juncture," petitioner had not established that he was entitled to post-conviction relief and the post-conviction appeal must fail. The court stated "[b]ecause Petitioner's application is based upon the results of DNA testing, and the testing has yet to be accomplished, a post-conviction appeal is premature." City's Ex. 70, p. 3. In that same order, the OCCA granted petitioner's writ of mandamus. The OCCA ordered the forensic evidence to be preserved in its present state as previously ordered by the District Court and further stated: "This, however, does not prohibit testing by the Petitioner pursuant to an order of the District Court." City's Ex. 70, p. 6.

On March 18, 1997, Gilchrist made an inventory of the forensic evidence. City's Ex. 71. On March 28, 1997, the District Court directed Gilchrist to ship the forensic evidence to Brian Wraxall ("Wraxall"), SERI's chief forensic serologist.

The evidence was received by Wraxall on April 2, 1997. City's Ex. 72. In a report dated April 22, 1997, Wraxall concluded that the "semen on both vaginal swabs . . . could not have originated from David Bryson;" the "semen on the 'Q 1' area from the robe

. . . is consistent with the semen found on the vaginal swabs . . . " and "[t]he semen could not have originated from David Bryson;" and the "semen on the Q2 area from the robe . . . is different from the semen on Q1 . . . and the vaginal swabs . . . " and the "semen could not have originated from David Bryson." City's Ex. 73, p. 5. (emphasis in original)[4]

On April 22, 1997, due to the statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, Bryson filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, CIV-97-622-C, to preserve other constitutional claims resulting from his trial and conviction in 1983. City's Ex. 60, p. 9. The case was later administratively closed by the court to allow exhaustion of state remedies. Case No. CIV-97-622-C, doc. no. 17.

On May 5, 1997, Bryson filed another application for post-conviction relief in the District Court alleging that the DNA evidence was "newly discovered evidence" and the results exonerated him. City's Ex. 60, p. 10.

On May 9, 1997, Gilchrist had a conversation with Macy. She made handwritten notes of that conversation which states "@ this point, have no biological connection to Bryson." City's Ex. 74.

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[4] It appears Ms. Taylor died subsequent to the DNA testing. *See*, plaintiff's response, doc. no. 124, p. 3, n.4.

The prosecution was granted leave to perform another DNA analysis on the evidence in Bryson's case. The evidence was sent to LabCorp. On September 3, 1997, serologist Meghan Clement issued a report concluding that Bryson was excluded as the semen donor. Bryson's Ex. 77, p. 5-6; Bryson's Ex. 55.

On November 3, 1997, three hair slides were sent to LabCorp for DNA testing at the request of Assistant District Attorney Pattye High and analyzed. Gilchrist's Ex. 3, p. 440, ll. 16-19; City's Ex. 75, Ex. 76. LabCorp was unable to obtain a sufficient amount of DNA to obtain PCR analysis of the hair. City's Ex. 76.

On December 30, 1997, the District Court, without conducting an evidentiary hearing, denied Bryson's application for post-conviction relief, concluding that the DNA evidence would not have changed the verdict of Bryson's trial because of the overwhelming evidence of guilt. City's Ex. 77.

Bryson appealed the decision to the OCCA and on February 9, 1999, the OCCA entered an order remanding the application to the District Court for an evidentiary hearing.

An evidentiary hearing was held on March 18, 1999 and April 1, 1999. Gilchrist testified at the hearing on March 18th. Bryson's Ex. 72. She testified that when she did her testing in 1982 and when she testified in court, she determined that the donor of the semen on the robe was type B (Q 1 and Q2) and that the donor of the semen on the vaginal swabs,

both the cervix and the post fornix swabs, were a type B. *Id.* at p. 27, ll. 16-25, p. 28, l. 1. She also confirmed her testimony at trial that the person who committed the offense was a B secretor. *Id.*, p. 31, ll. 3-6. She also testified that she was not able to exclude Bryson as a donor of the hairs. *Id.* at p. 38, ll. 16-25, p. 39, ll. 1-3. Testimony was also elicited that Ms. Taylor had sex at 6:15 a.m. the morning of the sexual assaults. Ms. Gilchrist testified that if it was not known who the person was with whom she had sex at 6:15 a.m. that the person could not be excluded from the DNA analysis by Wraxall and LabCorp. *Id.* at p. 37, ll. 9-25, p. 38, ll. 1-4.

On March 31, 1999, the District Court issued an order denying the application. City's Ex. 79. The court found the evidence in the case, notwithstanding the DNA evidence, was overwhelming. The court stated:

> . . . Brian Wraxall's opinion is that Petitioner was not the donor on the semen found on the evidence presented for testing and ***that if there is no other explanation as to the source of the semen, then this P titioner should be excluded as the assailant.*** There is other explanation here, that is, an act of sexual intercourse by the victim on the same morning.
>
> . . . The evidence presented, coupled with a scientific explanation of the absence of Petitioner's semen and the presence of that of another, would have still led the jury at this

> Petitioner's trial in 1983 to conclude that Petitioner was guilty as charged.
>
> *Id.*, pp. 11-12.

Bryson appealed again. On August 13, 1999, the OCCA reversed the District Court's order denying petitioner post-conviction relief. The OCCA stated:

> . . . we do not agree [with the district court's] finding that there is "other explanation" of "an act of sexual intercourse by the victim on that same morning" as a basis for the denial of post-conviction relief.
>
> . . . . As Petitioner asserts, "[t]he circumstances from the trial and post-conviction proceedings establish the 6:15 a.m. sex was with her fiancee." There is nothing in the record to indicate any other sexual partner of the victim. And, DNA testing excludes the victim's fiancee from being a semen donor.
>
> . . . we find the DNA evidence does, in fact create a reasonable probability of changing the outcome of this trial. DNA testing by two separate entities conclusively eliminates Petitioner, as well as the victim's fiancee. The evidence supports Petitioner's argument that the rapist did ejaculate . . .
>
> * * *
>
> Therefore, finding sufficient evidence of material facts that requires vacation of Petitioner's conviction in the interest of justice, we find it necessary to **REVERSE** the order of the District Court denying Petitioner

> post-conviction relief. Further, the Judgment and Sentence imposed against Petitioner in the District Court of Oklahoma County, Case No. CRF-82-5031, is hereby **VACATED** and **SET ASIDE** and Petitioner is hereby **GRANTED** a **NEW TRIAL**.

City's Ex. 80, pp. 5, 6 and 8 (emphasis in original).

Bond for defendant was set at $200,000 and after a writ of habeas corpus to the OCCA, the amount of the bond was reduced to $100,000. On October 15 1999, Bryson was released from incarceration after posting the $100,000 bond. Bryson's bond was later reduced to $40,000 by agreement of the parties. Macy's Ex. 22, Macy's Ex. 25, p. 17.

D. *Bryson's Case Dismissed*

On August 27, 1999, United States Senior District Judge Ralph G. Thompson issued a memorandum opinion in *Mitchell v. Ward*, 150 F.Supp.2d 1194 (W.D.Okla.1999), rev'd in part, *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir.2001), which was critical of Gilchrist's testimony and conduct. Judge Thompson found Gilchrist's trial testimony to be "without question, untrue" and to be "at least, misleading." 150 F.Supp.2d at 1226-1229. In the opinion, Judge Thompson noted that Gilchrist had been criticized in other opinions of the Oklahoma Court of Criminal Appeals for her testimony and conduct, *McCarty v. State*, 765 P.2d 1215, 1217-19 (Okla.Crim.App.1988); *Fox v. State*, 779 P.2d 562, 571-72 (Okla.Crim.App.1989); *Pierce v.*

State, 786 P.2d 1255, 1261 (Okla.Crim.App.1990); *Miller v. State*, 809 P.2d 1317, 1319-20 (Okla.Crim.App.1991). *Id.* at 1229, n. 52. As a result of the opinion, Gilchrist's supervisor, Byron Boshell ("Boshell"), was asked to conduct an investigation on the impact of the court rulings on the forensic laboratory. Bryson's Ex. 13; Bryson's Ex. 14, p. 12, ll. 1-5.

Laura Schile ("Schile") and Elaine Taylor, OCPD forensic chemists, were asked by Boshell to conduct an examination of the hairs in Bryson's case. In their examination, they failed to find similarities between the crime scene hairs and those of Bryson. They made the recommendation that the Bryson hairs be thoroughly inspected by an outside analyst. Bryson's Ex. 52; Bryson's Ex. 41.

On August 30, 2000, Fisher inspected the forensic evidence and discovered some was missing. On September 19, 2000, he filed a motion for access to the remaining evidence for DNA testing. The Assistant District Attorney, Pattye High, advised Fisher that she had already told Gilchrist to send out the hair evidence. Gilchrist told Fisher she had not yet sent out the evidence because she had not received the message. On September 20, 2000, Fisher filed a request for an order to prevent DNA testing until a protocol could be established. This request was granted on September 21, 2000. Complaint filed in CIV-04-662-F, pp. 31-33 and City's Ex. 53, pp. 18-19.

At the request of the FBI, Oklahoma City and the OCPD, Douglas W. Deedrick ("Deedrick"), FBI

supervisory special agent, conducted a review of eight cases handled by Gilchrist spanning the period of 1982 to 1991. On April 4, 2001, Deedrick issued a report on his review. One of the cases he reviewed was the Bryson case. Bryson's Ex. 20. In the report, Deedrick stated:

> In this case, Gilchrist identifies a pubic hair like the suspect's known pubic hairs on the victim's skirt and three (3) head hairs like the suspect's known head hairs on/in items from the victim and scene.
>
> The pubic hair had been mailed to LabCorp of America in November, 1997 and a portion of the hair was removed for testing. The remaining portion was examined by SSA Deedrick in the OCPD laboratory. The hair consists of the distal portion of a body hair of undetermined racial origin. This hair does not exhibit the same microscopic characteristics as the known pubic hairs of the suspect or victim.
>
> The questioned head hairs identified with the suspect do not exhibit the same microscopic characteristics as the known head hairs from the suspect. It is noted that the known head hair samples from the victim and suspect are limited.

Bryson's Ex. 20, p. 5. Although he conducted a review of eight cases, only five of those cases had prepared

glass microscope slides that could be reexamined by Deedrick. In regard to these cases, Deedrick stated:

> [A]ll five cases reviewed had either errors in identification or interpretation. Hairs that had been associated to suspects and/or victims were either too limited for meaningful comparison purposes or associated incorrectly. The incorrect associations could have been resolved if a confirmation policy existed, where another examiner would independently review the associations.

Id. at 20, p. 1. Deedrick also criticized Gilchrist's trial testimony in the Bryson case, wherein Gilchrist testified: "I would think it would be impossible not to be able to distinguish hairs from two different individuals if that's what you're saying." Deedrick stated that Gilchrist implies that the hairs are "'unique' to an individual, and misrepresents the science of hair comparisons." *Id.* at p. 5.

Prior to Deedrick's report, Macy was advised by Chief of Police M.T. Berry by letter dated March 23, 2001 that the FBI had found that the hair evidence did not match in the Bryson case. City's Ex. 83.

On August 21, 2001, an Oklahoma City Departmental Review Board convened to review evidence and facts concerning alleged violations by Gilchrist of Oklahoma City Personnel and Oklahoma City Department policies. The hearing lasted fourteen days consisting of eight days of testimony and six days of

Board deliberations. On September 21, 2001, the Board issued a report wherein, it recommended that Gilchrist be terminated. Bryson's Ex. 19. The Board found in part that Gilchrist engaged in casework analysis that was found to be flawed and improperly documented. *Id.* at 15-18. This included the Bryson case. The Board could find "little or no evidence that Joyce Gilchrist is able to properly conduct hair analysis." *Id.* at p. 17.

On September 25, 2001, Gilchrist was terminated in part because of her work in Bryson's criminal case. City's Ex. 84.

In March of 2002, an agreement was reached between Bryson's counsel and Assistant District Attorney, Richard Wintory, for the DNA testing of the remaining evidence, *i.e.* hair, bite swabbing, torn fingernail, pot pipe and hair root. The evidence was sent to Wraxall, who tested it in March 2003. In a report dated March 6, 2003, Wraxall determined that "[n]one of the evidence examined shows the presence of *any* DNA from David Bryson." City's Ex. 86, p. 8 (emphasis in original).

On May 16, 2003, Richard Wintory, on behalf of the State of Oklahoma, filed a Motion to Dismiss and Recall Warrant. The motion stated in part:

> "[E]vidence developed by and through the advanced technology of DNA testing, which was not available to investigating agencies at the time of charging the defendant and

> through his first criminal trial and subsequent state appeals, establishes conclusively that Bryson is excluded as the sperm contributor and further DNA testing of all biological evidence collected in this case has failed to generate results that either confirm or deny Bryson is the perpetrator of the crimes charged herein. Therefore, the State of Oklahoma moves for dismissal of the charges against David Johns Bryson and recall of the arrest warrant based on evidence developed through DNA technology which raises a doubt of the defendant's guilt which is reasonable."

City's Ex. 87, pp. 6-7.

On June 24, 2003, the District Court entered an order sustaining the motion and ordered the case "dismissed." In the order, the court stated that it had found no authority to dismiss the case with prejudice as requested by defendant. The court ordered the arrest warrant cancelled, withdrawn and recalled and ordered defendant's bond exonerated.

E. *Gilchrist's January 23, 1983 Report Challenged*

Wraxall concludes that the January 23, 1983 report by Gilchrist is incomplete and misleading. Bryson's Ex. 24. Initially, Wraxall found Katherine

Kuritz to be a non secretor rather than a secretor as found by Gilchrist. He also found:

> On 10-18-02 Ms. Gilchrist conducted the absorption inhibition test[5] on [the vaginal aspirate, swabs and rectal swab] and found that no secreted B antigen, consistent with Mr. Bryson, was found. The notes indicate, however, that the positive control was not working correctly. The test was repeated the next day and again the positive control was not working correctly. These tests were not repeated even though a A/I test was conducted on 1-25-83 with correct positive controls. Therefore, based on the results, no conclusion should be drawn regarding the ABO & secretor status of the semen donor. However, assuming that the results on the evidence are correct, several inconsistencies in Ms. Gilchrist's interpretation are apparent:
>
> > 1) A review of Ms. Gilchrist's notes regarding the P30 assay reveals that there was a high level of semen on the Cervical Swab sufficient for a B blood type to have been detected, if it existed. This strongly indicates that David Bryson was excluded as being a contributor of the semen found in the vagina of Theresa Taylor.

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[5] The method for detecting the ABO blood group substances in body fluids.

2) While there is predominantly H antigen on the Cervical Swab, consistent with the victim, there are indications of A antigen on the Vaginal Aspirate and Rectal Swab. The presence of A antigen is inconsistent with either Theresa Taylor or David Bryson. In light of the presence of A antigen on the Pipe this should have been explored further.

3) The absorption elution (A/E) test is more sensitive and is used for detecting small amounts of the ABO blood group substances which are found in non-secretors and also in dilute stains from secretors. The absorption elution test is prone to false positive results due to "wash reactions." Ms. Gilchrist's notes show only "+" and "-" scoring instead of the customary 1 to 4 scoring of agglutination intensity which she used in the absorption inhibition test. Her absorption elution test results show weak positive results for the B antigen on 3 of the 4 swabs and a "REPEAT" note appears on the bottom of the page of her notes. It does not appear that a repeat test was conducted. Even if the A/E test was correct the combined results of the P30, A/I and A/E on the Cervical Swab would indicate a B non-secretor which would exclude Mr. Bryson.

There are 2 semen stains (labeled Q1 and Q2) on the Robe that are the result of vaginal discharge. The P30 assay on Q1 showed the same high level of semen

as found on the Cervical Swab and again gave test results by A/I of only H antigen but no B antigen. Stain Q2 however contained a lower level of semen by P30 assay but by A-1 gave test results of clear B and H antigens. This is strong evidence that there are probably 2 semen donors on the Robe. Again if Katherine Kuritz, the owner of the robe, is in fact a non-secretor, then she could not be a contributor to the Q1 semen stain. That would mean that stain Q1 came from Ms. Taylor and based on the P30 and A/I results, Mr. Bryson is excluded. The B antigen obtained by the A/E could have come from the background of the robe and therefore from Thomas Kuritz. Ms. Gilchrist failed to run a substrate or background control from the robe as she was taught in my laboratory at Serological Research Institute in California.

Wraxall then concluded:

> Ms. Gilchrist's conclusions as stated in her report of 1-28-[8]3 are badly written at best but in fact are totally misleading as follows:
>
> > 1) The results from the vaginal aspirate, vaginal and rectal swabs together with both stains from the robe are combined by Ms. Gilchrist to conclude that the semen donor on all items is a B Secretor "and the semen could have originated from Bryson." Of all the items and stains only one could be from a B Secretor (i.e. Q2 on the Robe) and that semen could have originated from Thomas Kuritz. That fact does not get reported

until 2 paragraphs later and then in a discussion about PGM.

2) No mention is made of the different A/I results between the 2 stains on the robe. They are lumped together as "semen stains."

3) Statements are made on 2 occasions in the conclusions that all four individuals (ie Ms. Taylor, Mr. Bryson and Mr. & Mrs. Kuritz) are all the same PGM type (2-1) and "therefore no conclusion as to the PGM type of the semen donor can be drawn." This is wrong for 3 reasons:

a) The PGM types are all type 1, not 2-1, as the photograph of the results clearly shows.

b) The conclusion gives the impression that a PGM result was obtained when it was not, and

c) If a PGM test is completed on the evidence items and a type other than that of the four individuals is obtained, then Mr. Bryson would be excluded as the semen donor. It is a totally false premise that in sexual assault cases, conducting PGM tests where the victim and suspect are the same type will not give usable results. This presumes that the suspect is the semen donor.

In addition, Wraxall concludes that Gilchrist "should have seen that Mr. Bryson was excluded as the semen donor on the Cervical Swab and on the Q1 stain on the Robe." Bryson's Ex. 24.

Laura Schile[6] concludes that "[n]one of the purported pubic hairs from the crime scene and/or from the victim and her clothing have the prominent characteristics of David Bryson's pubic hair." Bryson's Ex. 52. Schile also concludes:

> . . . Joyce Gilchrist, with even minimal competence, would have been able to determine in 1983 that David Bryson could be excluded as the source of the hairs obtained from the crime scene and from the victim.
>
> . . . It would be obvious to any competent hair analyst – and for that matter to most or all lay persons – that David Bryson's pubic hairs are markedly different from the hairs collected in Bryson's case and identified as pubic hair from the crime scene and/or the victim.

Id.

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[6] Schile, a former OCPD forensic chemist, is currently employed as the Chief of Forensic Services for the Oklahoma Indigent Defense System and has a private forensic consulting firm based in Tulsa, Oklahoma. Bryson's Ex. 52.

F. *Gilchrist's Training and Supervision*

In May, 1980, Gilchrist received a Bachelor of Science degree from Central State University in Edmond, Oklahoma. Gilchrist's major was forensic science. City's Ex. 1. Gilchrist's official transcript shows a checkered academic career (which commenced in 1966) and a dismal academic record. *Id.*

From February through May of 1980, Gilchrist interned in the Oklahoma City Police Department forensic laboratory as a degree requirement. Gilchrist's Ex. 1, p. 6, ll.1-25, p. 7, 1-2, p. 8, ll. 13-17; City's Ex. 2. Gilchrist worked with and received training from Janice Davis. Gilchrist's Ex. 1, p. 9, ll. 15-25, p. 10, ll. 1-2. On July 1, 1980, Gilchrist was employed by the City of Oklahoma City as a forensic chemist and assigned to the forensic laboratory. City's Ex. 2. Gilchrist was assigned her first case on or about August 4, 1980. City's Notice to the Court and Plaintiff (doc. no. 142).[7]

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[7] Gilchrist testified in deposition that she was given her first case in mid or late 1981 and that her training period ended in the fall of 1981. Gilchrist's Ex. 1, p. 29, ll. 24-25; p. 30, ll. 1-6. After the filing of the summary judgment briefs, the City notified the court and plaintiff that it had been advised of the existence of an assignment log of forensic cases. *See*, Notice to the Court and the Plaintiff (doc. no. 142). From a review of the log, it appeared to the City that the first case assigned to Gilchrist was on or about August 4, 1980. The earliest lab report found by Gilchrist was completed on September 22, 1980. The City could not state whether Gilchrist worked with another chemist on the case. *Id.* The court appreciates the candor of the

(Continued on following page)

From August 4 through August 22 of 1980, Gilchrist attended the Blood Stain Analysis System Course given by the Serological Research Institute ("SERI"), in Emeryville, California. City's Ex. 5. From January 11 through January 23, 1981, Gilchrist attended the Basic Forensic Serology School given by the Federal Bureau of Investigation ("FBI") at the FBI Academy in Quantico, Virginia. She attended the Introduction to Hairs and Fibers School at the FBI Academy from January 25, 1981 to February 6, 1981. During this course, Gilchrist was provided a 131-page manual entitled Technical and Legal Aspects of Forensic Serology: A Laboratory Manual. At the end of February 1981, Gilchrist returned to SERI to attend a Semen Analysis Course. This course lasted four days. *Id.*

In the 1980's, many, if not most forensic laboratories, had training programs for serology and hair/fiber examiners that were typically one to two years in duration. Bryson's Ex. 1, p. 13. The FBI hair course is an introductory course to allow one to proceed with on-the-job training to become fully qualified. This course does not fully qualify a scientist to work independently in hair analysis. Bryson's Ex. 57, p. 7.

City and viewing the facts in a light most favorable to plaintiff finds that Gilchrist was assigned her first case in August 4, 1980 rather than in mid or late 1981 and her on-the-job training ended at that time.

After Gilchrist was terminated, her office was inventoried. A pamphlet, a booklet and a training outline were found in the office which advised witnesses to tell the truth when providing courtroom testimony. City's Exs. 13, 14 and 15. A January 1977 manual by the FBI entitled Microscopy of Hair was also found. City's Ex. 12.

The OCPD forensic laboratory was commanded by commissioned police officers. Gilchrist's Ex. 1, p. 32, ll. 21-24. These police officers did not have a scientific background or experience in forensic science. *Id.* at p. 33, 6-16. None of Gilchrist's supervisors were qualified to know whether she conducted her tests correctly. *Id.* at p. 34, ll. 10-15.

Richard DeLaughter ("DeLaughter"), a captain with the OCPD, supervised the forensic laboratory during 1982 and 1983, the period of the Bryson case. Bryson's Ex. 5, p. 9, ll. 3-14, p. 12, ll. 2-11, p. 13, ll. 1-2. Mr. DeLaughter "had a couple of people in the lab that [he] depended on quite a bit for . . . keeping [him] informed on what was going on in the lab or in the system." Those individuals were Janice Davis and Janie Bates. "[T]hey kind of ran things." *Id.* at p. 9, ll. 15-24. He relied upon them to "develop procedures and policies, to do whatever is necessary to operate a forensic laboratory." *Id.* at p. 10. "They created policy that created peer review. So that cases could be cross-checked when done." *Id.* at p. 11, ll. 21-22. DeLaughter, however, did not ever view a peer review. He relied upon Janice Davis and Janie Bates' word that peer review was being conducted. *Id.* at

p. 17, ll. 9-21. After Gilchrist's training, none of her cases were reviewed by Janice Davis or anyone else. Gilchrist's Ex. 1, p. 28, ll. 16-18.

DeLaughter gave annual performance evaluations for Gilchrist in 1982 and 1983. Bryson's Ex. 5, p. 24, ll. 15-25; p. 25. ll. 1-6; p. 27, ll. 16-19, p. 39, ll. 8-11. Although DeLaughter rated her "fully competent" on most skills evaluated, he did not independently verify or analyze the skills that were evaluated. *Id.* at p. 30, l. 25; p. 31, ll. 1-3; p. 32, ll. 8-11; p. 40, ll. 16-19.

DeLaughter did not have a policy of attending trials to hear the testimony of the forensic chemists to make sure they were testifying truthfully or credibly. Bryson's Ex. 5, p. 23, ll. 11-15. He could not recall ever sitting through the testimony of Gilchrist. *Id.* at ll. 16-18.

There was no lab policy and procedure manual for the forensic laboratory in 1982. Ex. 70, p. 25, ll. 13-23.

G. *Additional Involvement of Robert Macy*

Macy started his career as District Attorney in June 1980. Bryson's Ex. 44, p. 6, ll. 13-15; p. 34, l. 23. It ended in March 2001. *Id.* at ll. 16-18.

Prior to 1986, Macy did not have a policy about informing the defense of forensic evidence that could be useful to the defense. Bryson's Ex. 44, p. 46, ll. 22-25; p. 47, ll. 3-4. The formal training provided to Assistant District Attorneys for Oklahoma County did

not include the fair and proper use of forensic evidence. Bryson's Ex. 50, p. 9, ll. 14-17; p. 11, ll. 19-25. There was no in-house training regarding the use of forensic evidence. Bryson's Ex. 50, p. 14, ll. 12-25, p. 15, ll. 16. The training should have included the use of and evaluation of forensic evidence and the use and preparation of expert witnesses. Bryson's Ex. 42.

The prosecutors in Macy's office had no formal, established standards regarding the use and application of their prosecutorial powers, including the requirement that they provide, without request, all material which might tend to exonerate a defendant or lead to a lesser punishment. Bryson's Ex. 42.

From mid-1970 until mid-1980's, Janie Bates worked for the OCPD forensic laboratory and during much of that time was a senior forensic chemist. According to Ms. Bates, who had duties regarding the budget, the District Attorney's office funded a position in the OCPD forensic laboratory. To the best of her recollection, that position was filled by Gilchrist. Ms. Bates is not sure of the exact dates the position was funded but it would have been during the 1980's. Bryson's Ex. 83.

During his deposition, Macy testified:

> Q. (By Mr. Barrett [plaintiff's counsel]) Mr. Macy, there's been testimony in this case that your office paid for a part of the operation of the Oklahoma City Police Department forensic laboratory. Assuming that to be true, do you believe that would carry

with it an obligation to make sure that money would be well spent?

A. I recall seeing somewhere since this lawsuit has been involved some kind of written agreement between the Oklahoma City Police Department and I assume it was my office, but –

Q. You would not want to make that expenditure unless you considered that money to be well spent, would you?

A. That's right.

* * *

Q. I certainly don't want to stop you from making an answer, but, Mr. Macy, do you believe that spending that money on the laboratory would carry with it an obligation to make sure that that money was well spent?

* * *

A. There would be a responsibility to see to it the money was well spent.

Q. And to assure the money was well spent, did you undertake any investigations of the quality of their scientific work apart from what you observed in the courtrooms?

* * *

A. I don't know of any independent review of the work.

Bryson's Ex. 44, Volume IV, p. 228, 1-25, p. 229, ll. 1-10.

On January 17, 1987, a forensic chemist, John Wilson, filed a complaint with a forensic association, Southwestern Association of Forensic Scientists, of which he and Gilchrist were members. City's Ex. 43. This complaint involved Gilchrist's actions and testimony in several cases. He had initially become aware of "a serious situation existing in the forensic community" in 1985. *Id.* On November 9, 1987, Gilchrist was sent the association's findings, which stated: "The Board of Directors of this Association has concluded that while a violation of the letter of our Code of Ethics has occurred, this is not a violation of the spirit of our Code, and was made without malice or intent. We therefore do not recommend expulsion of Ms. Gilchrist; neither do we censure nor discipline her." City's Ex. 44. Walt Wilhelm, OCPD Deputy Chief, advised Police Chief, Robert Wilder, about the decision and they consulted with Macy. Bryson's Ex. 75, p. 20, ll. 18-20. Macy convinced Wilhelm that Gilchrist was acting within professional boundaries. *Id.* at p. 24, 5-7. Macy had a lot of sway regarding Gilchrist by virtue of his position. *Id.* at p. 24, ll. 23-25. Macy publicly defended Gilchrist concerning the criticism. He said that she was "'one (chemist) who is willing to give an opinion (about test results).'" He also said that "[part of] the problem I've had with forensic experts is that they're too cautious." Bryson's Ex. 84, second Tulsa Tribune article.

After the OCCA granted Bryson post-conviction relief, Macy stated in a television interview that he

intended to try Bryson and convict him on the same evidence. City's Ex. 94.

IV. *Discussion*

A. *Statute of Limitations*

In their papers, the City and Macy contend that plaintiff's § 1983 claims for malicious prosecution and bad faith denial of post-conviction access to potentially exculpatory evidence are time-barred. The statute of limitations for a § 1983 claim is the same as the statute of limitations for a personal injury action in the state in which the claim arose. *Wallace v. Kato,* 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). In Oklahoma, the limitations period for a personal injury action is two years. 12 O.S. § 95(A)(3). Although state law provides the statute of limitations to be applied, federal law governs when the limitations period begins to run. *Wallace,* 549 U.S. at 388, 127 S.Ct. 1091. Accrual of a § 1983 claim occurs when the plaintiff has a complete and present cause of action, that is, where the plaintiff can file and obtain relief. *Id.* at 389, 127 S.Ct. 1091.

The parties also challenged the timeliness of the § 1983 claims at the motion to dismiss stage, which the court rejected. Citing *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the court concluded that the claims did not accrue until the charges against Bryson were dismissed on June 24, 2003, because success on both claims, as pled by

plaintiff, would have necessarily implied that his conviction was wrongful.[8] The original action was

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[8] In *Heck*, a state prisoner filed suit under § 1983 raising claims which, if true, would have established the invalidity of his outstanding criminal conviction. The Supreme Court stated:

> "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983."

Id. at 486-487, 114 S.Ct. 2364 (footnote omitted).

The Court rested this conclusion upon "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486, 114 S.Ct. 2364. The Court stated that Congress "has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.'" *Id.* at 482, 114 S.Ct. 2364 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 490, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)).

Thus, under Heck, "[A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* at 489-90, 114 S.Ct. 2364.

Furthermore, the Tenth Circuit, in *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir.1999), found that "Heck precludes § 1983 claims relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from

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filed within the two-year limitations period. Although the original action was dismissed without prejudice and the present action was not filed until after the two-year statute of limitations period had expired, the court concluded that by operation of Oklahoma savings statute, 12 O.S.2001 § 100,[9] plaintiff's claims were timely filed.

In the present motions, the City and Macy assert that the limitations period for the malicious prosecution claim commenced on August 13, 1999 when Bryson's conviction was reversed. They contend that, as of August 13, 1999, there was no outstanding criminal judgment and that *Heck* consequently would not apply. They maintain that the Tenth Circuit, in *Smith v. Gonzales,* 222 F.3d 1220 (10th Cir.2000), concluded that the statute of limitations on a plaintiff's "wrongful conviction" claim began when the plaintiff's conviction was reversed despite the existence of renewed prosecution on those charges. Furthermore, the City argues that although charges were still pending against Bryson after August 13, 1999, the Supreme Court concluded in *Wallace v. Kato* that

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prosecution of the pending charges. Such claims arise at the time the charges are dismissed."

[9] In *Brown v. Hartshorne Pub. Sch. Dist. # 1,* 926 F.2d 959, 962 (10th Cir.1991), the Tenth Circuit concluded that Oklahoma's savings provision applies to a § 1983 claim.

Heck would not apply to a § 1983 claim brought before a conviction, i.e., to pending charges.[10]

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[10] In *Wallace*, the petitioner contended that *Heck* compelled a conclusion that his false arrest suit could not accrue until the state dropped the charges against him. Rejecting that argument, the Supreme Court stated:

> [T]he *Heck* rule for deferred accrual is called into play only when there exists "a conviction or sentence that has not been . . . invalidated," that is to say, an "outstanding criminal judgment." It delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn. We assume that, for purposes of the present tort action, the Heck principle would be applied not to the date of accrual but to the date on which the statute of limitations began to run, that is, the date petitioner became held pursuant to legal process. Even at that later time, there was in existence no criminal conviction that the cause of action would impugn; indeed, there may not even have been an indictment.
>
> What petitioner seeks, in other words, is the adoption of a principle that goes well beyond Heck: that an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious. In an action for false arrest it would require the plaintiff (and if he brings suit promptly, the court) to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict, – all this at a time when it can hardly be known what evidence the prosecution has in its possession. And what if the plaintiff (or the court) guesses wrong, and the anticipated future conviction never occurs, because of acquittal or dismissal? Does that event (instead of the Heck – required setting

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The court, upon further consideration, again determines that Bryson's malicious prosecution claim is timely. The court, however, reaches this determination for a different reason. As stated by the Supreme Court in *Wallace v. Kato,* accrual of a § 1983 claim occurs when the plaintiff has a complete and present action. In other words, the claim accrues when the plaintiff can file and obtain relief. *Id.* at 389, 127 S.Ct. 1091. According to the Tenth Circuit, "a due process claim for malicious prosecution arises only once 'the original action,' whatever form it has taken, has 'been terminated in favor of plaintiff.'" *Mondragon v. Thompson,* 519 F.3d 1078, 1083 (10th Cir.2008). Therefore, "[b]ecause the statute of limitations does not start running before the elements of a claim are satisfied, the statute of limitations for [the due process claim for malicious prosecution] cannot start until the plaintiff has achieved a favorable result in the original action." *Id.*

> aside of the extant conviction) trigger accrual of the cause of action? Or what if prosecution never occurs – what will the trigger be then?
>
> We are not disposed to embrace this bizarre extension of Heck. If a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.

Wallace, 549 U.S. at 393-394, 127 S.Ct. 1091.

In the case at bar, the original action did not terminate in favor of plaintiff until June 24, 2003. Until that date, plaintiff could not sue for malicious prosecution under § 1983 and obtain relief. Although the original conviction was vacated and set aside on August 13, 1999, a new trial was granted and the original action continued. No new charging paper was filed. All pleadings were filed in the original action, CRF82-5031. Indeed, the dismissal order was filed in CRF-82-5031.[11] The court therefore concludes that plaintiff's § 1983 malicious prosecution claim did not accrue until the original action was terminated in favor of plaintiff with the dismissal of the action on June 24, 2003.

Because the court concludes that the § 1983 malicious prosecution claim accrued on June 24, 2003, the court concludes that the claim is timely under the applicable two-year statute of limitations and the savings provision.

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[11] In its reply, the City argues that Bryson's challenge to his continued prosecution after the reversal of the conviction, based upon Gilchrist's alleged fraudulent acts, was not alleged in the complaint. The City contends that none of the defendants had any notice that Bryson would change his theory of liability that the continued prosecution was also caused by Gilchrist's alleged fraudulent acts. The court, however, concludes that Bryson's malicious prosecution claim encompasses the entire prosecution. The court, as discussed hereinafter, concludes that there is evidence, viewed in a light most favorable to plaintiff, that Gilchrist's alleged fraudulent acts was a cause of the continued prosecution.

The court now turns to the challenge as to the timeliness of plaintiff's claim of bad faith denial of post-conviction access to potentially exculpatory evidence. In its papers, the City has proposed various accrual dates for the claim: (1) 1988, when Gilchrist advised Pearson that the forensic evidence was destroyed; (2) 1990, when the evidence was found, examined and reported by Cannon to be in existence; and (3) 1997, when the evidence was subjected to DNA testing. The City contends that with any of these proposed dates, the applicable two-year statute of limitations has long since expired. If the accrual date was deferred under *Heck*, the City also proposes that the accrual date commenced on August 13, 1999, when the conviction was vacated and set aside by OCCA. At that point, according to the City, there was no conviction to be impugned by a § 1983 action and *Heck* does not apply to pending charges as concluded by the Supreme Court in *Wallace*.

In his response, Bryson does not address the timeliness of the plaintiff's claim of bad faith denial of post-conviction access to potentially exculpatory evidence. He addresses only the timeliness of the malicious prosecution claim. The court, in its discretion, deems the statute of limitations issue confessed pursuant to LCvR 7.1(g). Although the issue is confessed, the court has again considered the timeliness of the claim. The court, upon further consideration, concludes that the claim is time-barred. Even if *Heck* deferred the accrual of the claim while Bryson's conviction was outstanding, the court concludes that

upon vacation of the conviction, Bryson could proceed with his § 1983 claim. At that point, Bryson not only had access to the evidence previously denied but also was able to use that evidence in the retrial of the charges against him. A § 1983 claim by Bryson seeking damages for the bad faith denial of post-conviction access to potentially exculpatory evidence would not have necessarily implied the invalidity of any conviction, past or anticipated.[12] The court therefore concludes that the limitations period applicable to plaintiff's claim of bad faith denial of post-conviction access to potentially exculpatory evidence would have expired in 2001. Because plaintiff's original action was not filed until 2004, the court concludes that the claim is time-barred.

Although the City and Macy challenged the timeliness of plaintiff's claim of bad faith denial of post-conviction access to potentially exculpatory evidence, Gilchrist has not. At the motion to dismiss stage, Gilchrist also failed to challenge the timeliness of the claim. *See*, doc. no. 47, p. 15, n. 4. Gilchrist's answer does not affirmatively set forth a statute of

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[12] In light of the court's ruling, the court need not decide whether *Wallace* has overruled the Tenth Circuit's decision in Beck that Heck applies to pending charges. The court, however, notes that the Tenth Circuit has continued to rely upon the Beck decision despite the existence of *Wallace*. *Williams v. Weber Morgan Strike Force*, 2009 WL 500666 (10th Cir. March 2, 2009); *Carson v. Tulsa Police Dept.*, 266 Fed.Appx. 763, 766 (10th Cir. February 21, 2008); *Meadows v. Whetsel*, 227 Fed.Appx. 769, 772 (10th Cir. May 22, 2007).

limitations defense. *See*, doc. no. 55, pp. 10-11. The court therefore concludes that this claim remains viable as to Gilchrist. Gilchrist has challenged the merits of the claim in her summary judgment papers. Those matters will be addressed below.

B. *Claim Against Gilchrist for Malicious Prosecution Under § 1983*

Gilchrist contends that she is entitled to summary judgment on plaintiff's § 1983 claim for malicious prosecution because she is shielded from liability under the doctrines of absolute and qualified immunity. Gilchrist contends that she is absolutely immune from liability for her trial testimony. In addition, she asserts that she is entitled to qualified immunity for her non-testimonial conduct because plaintiff cannot show a constitutional violation. According to Gilchrist, plaintiff cannot establish an absence of probable cause for his continued confinement or that she acted with malice, both essential elements of a malicious prosecution claim under § 1983.

Initially, the court need not address Gilchrist's absolute immunity argument. Plaintiff, in response, represents that he does not seek damages against Gilchrist for her trial testimony. He only seeks damages for her conduct out of court. Plaintiff may seek admission of the trial testimony to illuminate her out-of-court activities, but that it is an issue to be addressed in a motion in limine or at trial.

When a defendant asserts qualified immunity at the summary judgment stage, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established. *Martinez v. Beggs*, 563 F.3d 1082, 1088, 2009 WL 1058058 *4 (10th Cir.2009). The court has the discretion to determine "'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'" *Id.* (quoting *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009)). In this case, because the court has previously determined at the motion to dismiss stage that the "unconstitutionality of Gilchrist's alleged actions was apparent in 1982," *see*, doc. no. 47, p. 8, and the court's view has not changed, the court need not again address whether the constitutional right at issue was clearly established. The court therefore addresses whether plaintiff has presented facts sufficient to show that a constitutional violation occurred.

Gilchrist is correct that an essential element of the constitutional tort of malicious prosecution under § 1983 is the absence of probable cause to support plaintiff's prosecution or continued confinement. *Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir.2004). The mere fact that DNA evidence conclusively exonerated plaintiff is insufficient to support the malicious prosecution claim. *Id.* Plaintiff bears the "heavy burden of showing that Ms. Gilchrist's falsification of inculpatory evidence or suppression of

exculpatory evidence was necessary to a finding of probable cause." *Id.* at 1295.

In determining the existence of probable cause, the false information proffered must be set aside and the exculpatory evidence omitted must be included. *Pierce*, 359 F.3d at 1293, 1295. Applying these principles, the court concludes that the evidence of exculpatory facts presented by plaintiff[13] vitiates probable cause for the prosecution or continued confinement.[14]

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[13] Gilchrist argues that the only evidence plaintiff has to support its characterizations that Gilchrist's January 23, 1983 report was "false, fraudulent, falsified and fabricated" are the reports of plaintiff's experts and that their opinions are not evidence sufficient to overcome summary judgment. The court initially notes that Gilchrist has not challenged any of plaintiff's experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). While expert opinion may not be rejected it is conclusory, *see, Matthiesen v. Banc One Mortgage Corp.*, 173 F.3d 1242, 1247 (10th Cir.1999), the court finds that none of the expert opinions relied upon by plaintiff are conclusory. Although Gilchrist argues that none of the experts refer to Gilchrist's report as false, fraudulent, falsified or fabricated, the reasonable inference drawn from the experts' findings and opinions is that Gilchrist's conclusions in her report were false. Another reasonable inference from the opinions is that Gilchrist withheld exculpatory evidence.

[14] The City asserts in its papers that any claim regarding Gilchrist's analysis regarding the serological evidence has been waived because it was not raised in the original complaint filed in Case No. CIV-04-662-F. The court disagrees. The original complaint alleges that Bryson "voluntarily gave blood and saliva samples;" "Gilchrist also determined after testing on the semen and sperm samples obtained during the rape exam from Taylor's body and from a robe she wore after the rape, that the rapist

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Although the victim and a witness identified Bryson and Bryson had an injury to his penis, the court, as a matter of law, finds that the evidence would not be sufficient to support a finding of probable cause when considered with the forensic evidence that clearly excludes Bryson as the rapist. The court recognizes that after the DNA testing in 1997 was revealed, two Oklahoma County District Court judges denied Bryson post-conviction relief. However, the District Court, in reaching its decisions, relied upon another explanation presented by the state for the source of the semen, that is, Ms. Taylor had an act of sexual intercourse on the morning of the rape. The record

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was ABO type B and Bryson was ABO type B;" Gilchrist concluded "from these tests, Bryson was not excluded as the rapist;" Gilchrist failed to "conduct electrophoresis testing before trial;" and "Bryson does not at this time have sufficient information to allege that probable cause was lacking for his arrest or prosecution . . . " "Plaintiff may ask for leave to amend this complaint." City's Ex. 54, ¶¶ 24, 25. The court concludes that plaintiff put defendants on notice of the operative events and factual setting underlying a malicious prosecution claim which includes the serology evidence. Although the complaint in this case does not challenge Gilchrist's analysis of the serology evidence, discovery in this case has revealed that Gilchrist's conclusions in her January 23, 1983 report were totally misleading and that Bryson was excluded as the semen donor on the cervical swab and Q1 stain on the robe. Bryson's Ex. 62. Defendants have been apprised of this discovery since the end of 2008 and the court concludes that defendants are not unduly prejudiced by allowing the malicious prosecution claim to proceed also on the basis of Gilchrist's analysis of the serology evidence. The court grants plaintiff leave under Fed.R.Civ.P. 15(a) to include the evidence as a basis of his malicious prosecution claim in the pretrial report to be filed in this case.

did not support this explanation because the evidence revealed the rapist had ejaculated and there was no evidence to indicate any other sexual partner other than Ms. Taylor's fiancé, who had also been excluded by the DNA testing. The court therefore does not find that the denial of post-conviction relief by the Oklahoma County District Court is sufficient to establish as a matter of law existence of probable cause.[15]

Gilchrist also argues that her January 23, 1983 report was not the basis for the continued prosecution after 1999 because the 1997 DNA testing had revealed that the semen could not have originated from Bryson. The City, in its papers, also points out that

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[15] The City also argues that the judicial determination of probable cause at the preliminary hearing requires a finding that probable cause existed citing *Taylor v. Meacham*, 82 F.3d 1556 (10th Cir.1996) and *Hubbert v. City of Moore*, 923 F.2d 769, 773 (10th Cir.1991). The court disagrees. In *Pierce*, the Tenth Circuit stated: "The district court, [ ] held that '[e]ven when probable cause is present at the time of the arrest, evidence could later surface which would eliminate that probable cause.' Op. 8. We agree. . . . " *Pierce v. Gilchrist*, 359 F.3d at 1295. The Circuit also stated: "*If police officers have been instrumental in plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to decisions of prosecutors or grand jurors, or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded.*" *Id.* at 1292. (emphasis in original). There is evidence in the record that both the hair and serological evidence independently could have excluded plaintiff as a suspect. There is also evidence that Barry Albert, the prosecutor at Bryson's trial, testified at the evidentiary hearing in March 1999 that prosecutions had been declined on many cases as far back as 1982 where there were inconsistencies in the ABO blood typing. Macy's Ex. 20, pp. 7-8.

Gilchrist had revealed to Macy during a conversation in May of 1999 that there was no biological connection to Bryson and that in April of 2001, the FBI found Gilchrist's hair analysis to be flawed. Nonetheless, despite these revelations, the District Attorney's office continued to proceed with the prosecution of Bryson. The court, however, concludes that there is evidence viewed in a light most favorable to plaintiff to indicate that Gilchrist's report was a cause for Bryson's continued prosecution. Gilchrist testified as to her serology testing in the March 1999 evidentiary hearing, notwithstanding the 1997 DNA test results. There is also evidence in the record that Macy had stated in a television interview after the OCCA order granting post-conviction relief that he intended to try Bryson and convict him on the same evidence. City Ex. 94. Also, despite the FBI's 2001 report on the hair evidence, the evidence shows that hair evidence was sent in 2002 for DNA testing. After the hair evidence as well as the other evidence tested was found to have no connection to Bryson, the case against Bryson was finally dismissed. The court concludes, viewing the evidence and reasonable inferences drawn from the evidence in a light most favorable to plaintiff, that Gilchrist's report was a basis for continued prosecution of Bryson.

Another essential element of the constitutional tort of malicious prosecution claim is that defendant acted with malice. The court disagrees with Gilchrist that evidence of malice does not exist. The court concludes that a reasonable jury, based upon the

evidence in the record viewed in a light favorable to plaintiff, could conclude that Gilchrist acted with malice.

In sum, the court concludes that Gilchrist is not entitled to qualified immunity on the § 1983 claim for malicious prosecution. The court finds that summary judgment on this claim should be denied.

C. *Claim Against Gilchrist for Bad Faith Denial of Post-Conviction Access to Potentially Exculpatory Evidence for DNA Testing Under § 1983*

Gilchrist contends that she is entitled to summary judgment on plaintiff's § 1983 claim for bad faith denial of post-conviction access to potentially exculpatory evidence for DNA testing because she is shielded from liability under the doctrine of qualified immunity. According to Gilchrist, she is entitled to qualified immunity for her post-conviction conduct because plaintiff cannot show a violation of his due process rights. She also asserts that she did not violate a clearly established law in effect at the time of the alleged violation.

In this case, the court has previously determined at the motion to dismiss stage that "defendant Gilchrist had fair warning, in light of pre-existing Supreme Court precedent, that the due process right at issue here existed in 1988 and thereafter and that her alleged violation of that right was unconstitutional." *See*, doc. no. 47, p. 12. The court's view has

not changed and the court therefore does not again address whether the constitutional right at issue was clearly established. The court therefore addresses whether plaintiff has presented sufficient facts to show that a constitutional violation occurred.

Gilchrist asserts that plaintiff cannot show a constitutional violation because (i) she destroyed evidence in her possession due to a standard operating procedure and (ii) at the time of the destruction of that evidence, the exculpatory value of the evidence was not apparent and Bryson was able to obtain the evidence by other reasonably available means.

Plaintiff's claim, however, is not based upon the evidence that Gilchrist maintains that she destroyed.[16] *See,* plaintiff's response, doc. no. 122, p. 21 (Gilchrist's admission for summary judgment purposes is a "[non sequitur] in this case because the rape kit and other evidence were examined."). Plaintiff's claim is based upon the denial of access to evidence that was eventually found by Cannon and DNA tested. Pearson testified that he told Gilchrist that he "wanted everything that could be sent for DNA testing." Bryson's Ex. 86, p. 140, l. 25, p. 141, l. 1. She responded that "it had been destroyed." *Id.* at p. 141, ll. 2-3. Viewing the evidence and drawing

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[16] Although Gilchrist does not identify in her briefing what evidence was purportedly destroyed, Gilchrist's deposition testimony reveals that it was extracts made from evidence that was collected either from the victim and/or the crime scene. Gilchrist's Ex. 2, p. 336, ll. 4-7.

reasonable inferences in a light most favorable to plaintiff, the court concludes that a reasonable jury could conclude that Gilchrist's statement to Pearson was referring to more than the evidence she had had "in her possession." And the forensic evidence, that was in fact in existence and ultimately found, was not destroyed. Viewing the evidence in a light most favorable to plaintiff that Gilchrist falsified her original forensic report and withheld exculpatory evidence from Bryson, that Gilchrist had later told Bryson's counsel (in 1996) that the evidence was on her windowsill to be destroyed and that she consulted the Assistant District Attorney after having been asked to preserve it and was told to ignore the request to preserve it, *see* Bryson's Ex. 87, p. 7, ll. 7-14; City's Exs. 61 and 62, the court concludes, although it is a close question, that plaintiff has presented sufficient evidence to avoid summary judgment as to whether Gilchrist violated his due process rights.

Gilchrist contends that there are extraordinary circumstances in this case that justify qualified immunity. She contends that she relied upon counsel, Assistant District Attorney, Sandy Stensaas, to ignore Bryson's counsel's request to preserve the evidence. The court finds that extraordinary circumstances do not exist to shield Gilchrist from liability under the doctrine of qualified immunity. Although Gilchrist consulted Ms. Stensaas in 1996, she did not consult her in 1988 when she originally informed Bryson's trial counsel that the forensic evidence had been destroyed.

In sum, the court concludes that Gilchrist is not entitled to qualified immunity on plaintiff's bad faith denial of post-conviction access to potentially exculpatory evidence. The court finds that summary judgment on this claim should be denied.

D. *Supervisor Liability – Macy*

In his papers, Macy seeks summary judgment on plaintiff's claims to the extent they are based upon violations of the Fifth and Eighth Amendments. Plaintiff, in response, represents that he is not pursuing claims under either amendment. As plaintiff is not pursuing any such claims, and the court, at the motion to dismiss stage, *see,* doc. no. 47, dismissed any § 1983 claims alleged under the Fifth and Eighth Amendments, the court finds no need to address Macy's arguments relating to any such claims.[17]

Macy next contends that plaintiff cannot establish a malicious prosecution claim under § 1983. As do the City and Gilchrist, Macy contends that the finding of probable cause at the preliminary hearing and the two District Court judges' opinions denying post-conviction relief after DNA testing eliminates plaintiff's claim. However, the court, as previously discussed, has rejected the arguments

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[17] Macy also seeks summary judgment on any § 1983 conspiracy claim. The court dismissed this claim in its order addressing the motions to dismiss. *See,* doc. no. 47. The court therefore concludes that this claim is not viable.

that the judicial determination of probable cause at the preliminary hearing and the District Court's judge opinions require a finding that probable cause existed. The court concludes that plaintiff's evidence establishes the absence of probable cause element of his § 1983 malicious prosecution claim.

As previously discussed, one of the essential elements of a malicious prosecution claim is favorable termination of the original action in favor of plaintiff. *Pierce,* 359 F.3d at 1294. Macy argues that plaintiff cannot show favorable termination because the dismissal of plaintiff's action by the District Court was without prejudice. Citing *Glasgow v. Fox,* 757 P.2d 836 (Okla.1988), Macy contends that the dismissal without prejudice does not qualify as a favorable termination because it did not "'reach the substantive rights of the cause of action and thereby vindicate [plaintiff] as to the underlying action.'" *Id.* at 839.

Although Bryson's case was dismissed without prejudice, the court concludes that the dismissal qualifies as a favorable termination. "'Criminal proceedings are terminated in favor of the accused by the formal abandonment of the proceedings by the public prosecutor.'" *Wilkins,* 528 F.3d at 802 (quoting Restatement (Second) of Torts § 659(c)(1977)). "[T]he inability of a prosecutor to prove a case beyond a reasonable doubt at trial can be consistent with the innocence of the accused and can be deemed a favorable termination in favor of the accused." *Id.* at 803. The court, in making its determination of whether the dismissal constitutes a favorable termination,

must look at the stated reasons for the dismissal as well as the circumstances surrounding it in an attempt to determine whether the dismissal indicates innocence. *Id.* In the circumstances of this case, the state filed a motion to dismiss Bryson's case because "this case cannot go forward" and that the "evidence developed through DNA technology [ ] raises a doubt of the defendant's guilt which is reasonable." City's Ex. 87, pp. 6-7. It is clear to the court that the state's motion to dismiss shows an inability of the state to prove a case beyond a reasonable doubt against Bryson. Under the circumstances presented by this case, the court concludes quite easily that the state's lack of evidence to convict is consistent with a favorable termination. Although the District Court dismissed the case without prejudice, the court concludes that the circumstances surrounding the court's dismissal imply a formal abandonment of the criminal proceedings by the state and innocence on the part of Bryson. The court therefore concludes that the dismissal without prejudice satisfies the favorable termination requirement of the malicious prosecution claim. *Wilkins,* 528 F.3d at 804; *see also,* Restatement (Second) of Torts, § 659(c) and cmt. e (a formal abandonment by the public prosecutor is also indicated, "for example, by a motion to dismiss the complaint.").

Macy also contends that summary judgment is appropriate because plaintiff cannot show that he personally participated in the alleged wrongful acts that violated plaintiff's due process rights under the Fourteenth Amendment. To establish supervisor

liability under § 1983, a plaintiff must show that "an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Meade v. Grubbs,* 841 F.2d 1512, 1527 (10th Cir.1988). According to Macy, there is no evidence that he personally participated in the fabrication of evidence.

Plaintiff, on the other hand, contends that Macy personally participated in the violation of plaintiff's due process rights because Macy advised law enforcement on the issue of forensic evidence (encouraging scientists not to be too cautious) and attempted to assure that the forensic evidence tilted his way by complaining when a law enforcement chemist or employee testified for the defense. *See, e.g.,* Bryson's Ex. 84; Bryson's Ex. 44, p. 58, ll. 12-21 (Macy called the superiors of a Kansas City forensic chemist to get an agreement to not have their employees testify against Macy's forensic chemists); Bryson's Ex.44, p. 26, ll. 13-25, p. 27, ll. 6-10 (had discussion with Tom Bevel, who testified in blood splatter cases and employed by the police department, that testifying for defense was not appropriate).

The court concludes that the evidence offered by plaintiff is insufficient to show Macy's personal participation in the alleged malicious prosecution. The evidence does not establish that at the time of the alleged events in 1982 and 1983, Macy advised law enforcement, including Gilchrist, on the issue of forensic evidence or attempted to assure that forensic

evidence tilted in favor of the prosecution, including in the Bryson case. The court concludes that the evidence is not adequate to raise a genuine issue of material fact that he personally participated in the alleged constitutional deprivation.

Plaintiff also asserts that Macy is subject to § 1983 liability because he failed to train and supervise Gilchrist in the use of forensic evidence. A supervisor may be held liable where there is a failure to supervise or a "complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable." *Meade*, 841 F.2d at 1527, 1528. According to plaintiff, Macy was a de facto supervisor of Gilchrist because his office funded her position. The court has carefully reviewed the affidavit of Janie Bates as well as Macy's testimony which plaintiff proffers to establish that Macy was Gilchrist's de facto supervisor. The court concludes that this evidence is insufficient to establish a genuine issue of material fact on this issue. Neither the affidavit nor the testimony establish that Gilchrist's position was funded by the District Attorney's office during late 1982 and early 1983. Ms. Bates' affidavit only establishes that it was sometime "during the 1980's." Plaintiff has also not presented any authority supporting the notion that the funding of Gilchrist's position by the District Attorney's office would make Macy a supervisor over Gilchrist and would require him to perform a quality control function with respect to Gilchrist's work. Macy did testify that he had a responsibility to make sure that the funding his office

provided was well spent. The court, however, does not conclude that this testimony establishes that Macy was a de facto supervisor over Gilchrist. The court further concludes that the evidence of Deputy Chief Wilhelm's consultation with Macy about Wilson's complaint against Gilchrist does not show that Macy was a de facto supervisor. Although Macy may have had "a lot of sway" regarding Gilchrist, *see*, Bryson's Ex. 75 at p. 24, ll. 23-25, the court concludes that the evidence is not sufficient to establish an obligation or duty to train and supervise Gilchrist and to implement quality controls with respect to her forensic work.

The Tenth Circuit has stated that a "failure to supervise is only actionable under § 1983 against a defendant who had a duty to supervise." *Serna v. Colorado Dept. of Corrections,* 455 F.3d 1146, 1154 (10th Cir.2006). The court concludes that because plaintiff has failed to present evidence sufficient to raise a genuine issue of fact as to whether Macy was Gilchrist's supervisor, Macy cannot be held liable under § 1983 based upon a failure to train or supervise Gilchrist. There has been no showing, sufficient even for Rule 56 purposes, that Macy was affirmatively linked with Gilchrist's alleged constitutional violations.

Plaintiff further contends that Macy is liable under § 1983 because he failed to train or supervise his subordinates in the District Attorney's office as to the use of forensic evidence and the use and evaluation of expert witnesses. In addition, he contends that

Macy failed to establish any policies in regard to the use of forensic evidence and standards regarding the use and application of prosecutorial powers, including the requirement that prosecutors provide, without request, all matter which might tend to exonerate a defendant or lead to a lesser punishment. Macy, however, argues that he cannot be subjected to liability under § 1983 as he enjoys absolute prosecutorial immunity for the alleged failure to train or supervise and the alleged failure to establish policies. In support of his position, Macy relies upon the recent decision in *Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009). The plaintiff, in *Van de Kamp*, claimed that the district attorney and the chief deputy district attorney failed to adequately train and supervise their deputy district attorneys on the production of potential impeachment material about informants, and failed to create an information system for their deputy district attorneys containing potential impeachment material about informants. *Id.* at 861. The Supreme Court found that absolute prosecutorial immunity barred the claims. Notwithstanding that these claims addressed administrative functions, the Court found that they focused on "a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial." *Id.* at 862. The Court found these functions to be distinct from "administrative duties concerning . . . workplace, hiring, payroll administration, the maintenance of physical facilities, and the like" which are not given absolute immunity. *Id.* The Court concluded that the failure to supervise and train

claims at issue relied upon underlying misconduct by the deputy prosecutors at trial, who were themselves entitled to absolute immunity. *Id.* As to the information system claim, the Court found that the absolute immunity applied, because "determining the criteria for inclusion or exclusion [in an information system] requires knowledge of the law" and if such claim were allowed, the court would have to "review the office's legal judgments." *Id.* at 864.

The court finds that under *Van de Kamp,* Macy is entitled to absolute immunity from plaintiff's claim that he failed to train and supervise his subordinates. As in *Van de Kamp,* the claims alleged address issues intimately associated with the judicial process – the use of forensic evidence, use and evaluation of expert witnesses and the handling of exculpatory evidence. Any failure to train or supervise the subordinates with respect to these matters involves "a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial." *Van de Kamp,* 129 S.Ct. at 862.

There is evidence that after the OCCA vacated of the conviction, Macy publicly advised that Bryson would be retried and the same evidence would be used to convict. City's Ex. 94. The court, however, concludes that the decision to pursue the retrial of the charges and to use the same evidence is "intimately associated with the judicial process" and Macy is entitled to absolute immunity for any actions in seeking a retrial. *See, Buckley v. Fitzsimmons,* 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)

(a prosecutor's actions "which occur in the course of his role as an advocate for the State" receive absolute immunity).

In sum, the court finds that Macy is entitled to summary judgment on plaintiff's § 1983 claim against Macy based upon supervisory liability.

E. *Municipal Liability – City*

Plaintiff also contends that the City is liable under § 1983 on the basis that the City failed to adequately train and supervise Gilchrist, thereby causing Gilchrist to deprive Bryson of his constitutional rights.

The mere fact that an employee of a municipality deprived a plaintiff of a federal right is not itself a sufficient basis for holding the municipality liable to the plaintiff. In *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that in order to establish the liability of a municipality in a § 1983 action for the unconstitutional acts of a municipal employee below the policymaking level, a plaintiff must establish that the constitutional violation resulted from a municipal custom or policy. The municipality cannot be held liable under § 1983 solely because it employed the tortfeasor. *Id.* at 691, 98 S.Ct. 2018 ("a municipality cannot be held liable under § 1983 on a *respondeat superior* theory").

A municipality may be responsible for a constitutional violation by a municipal employee when a

municipality's failure to train its employee reflects a deliberate indifference to the plaintiff's constitutionality protected rights. *City of Canton v. Harris,* 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). That failure to train may "be properly thought of as [municipal] policy . . . [and] is actionable under § 1983." *Id.*

In *Canton,* the Supreme Court imposed strict limitations on municipal liability under § 1983 for lapses in training:

> We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition . . . that a municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation. Only where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city policy or custom that is actionable under § 1983. . . . Only where a failure to train reflects a deliberate or conscious choice by a municipality – a policy as defined by our prior cases – can a city be liable for such a failure under § 1983.

Canton, 489 U.S. at 388-389, 109 S.Ct. 1197 (internal citations, quotation marks, and brackets omitted).

The Tenth Circuit cases understandably treat allegations of failure to supervise the same way. *See, Medina v. City and County of Denver*, 960 F.2d 1493, 1500 (10th Cir.1992); *Schepp v. Fremont County*, 900 F.2d 1448, 1454 (10th Cir.1990); *Meade v. Grubbs*, 841 F.2d 1512, 1527-28 (10th Cir.1988).

In order to prevail on a claim against a municipality for failure to train or supervise, plaintiff must first prove[18] that the training or supervision was in fact inadequate, and then satisfy the following requirements:

> (1) Gilchrist's actions violated his constitutional rights: (2) the violation arose under circumstances that were usual and recurring situations for the City's forensic chemists; (3) the inadequate training or supervision demonstrates deliberate indifference to criminal suspects; and (4) there is a direct causal link between the constitutional deprivations and the inadequate training or supervision.

Carr v. Castle, 337 F.3d 1221, 1228 (10th Cir.2003); *Pierce v. Gilchrist*, 2007 WL 162522 (W.D.Okla. January 18, 2007). In this case, plaintiff's evidence is sufficient to raise a genuine issue of material fact as to the inadequacy of both the City's training and supervision of Gilchrist. The court additionally finds that plaintiff can satisfy, for summary judgment

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[18] Of course, plaintiff need not actually "prove" anything to defeat summary judgment. He must merely demonstrate the existence of a genuine issue of material fact.

purposes, the first two enumerated requirements. As for the first factor, the court has already found, as previously discussed in this order, that plaintiff can establish Gilchrist violated his constitutional rights. And as for the second factor, the court concludes that the alleged violation occurred under circumstances that were usual and recurring situations for forensic chemists, i.e. analyzing forensic evidence and reporting the results thereof for a criminal case.

With regard to the third factor, the Tenth Circuit has written as follows as to the showing plaintiff must make to establish a claim of deliberate indifference:

> The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations.

Carr v. Castle, 337 F.3d at 1229.

Viewing the record and drawing reasonable inferences in favor of plaintiff, the court finds insufficient evidence to raise a jury question as to the third factor. The evidence does not support a finding that the City acted with deliberate indifference. On the failure to train theory, there is no evidence of any previous incidents involving fabrication of evidence by one or more City chemists prior to 1980 or from 1980 to 1983. The record is devoid of any complaints or criticisms about a City chemist's work performance during this same time period. Consequently, the court concludes that plaintiff cannot show notice on the part of the City, through a pattern of tortious conduct, that its training program was deficient and that its failure to implement more or different was substantially certain to result in a violation of Bryson's constitutional rights.

The court also finds that this case does not fall within the "narrow range of circumstances" justifying a finding of deliberate indifference absent a pattern of violations. *Carr,* 337 F.3d at 1229. The court concludes that the evidence in the record fails to show that the need for more or different training was so obvious and the inadequacy so likely to result in the deprivation of Bryson's constitutional rights, that the City can be said to have been deliberately indifferent to the need. *Allen v. Muskogee,* 119 F.3d 837, 842 (10th Cir.1997) (quoting *Canton,* 489 U.S. at 390, 109 S.Ct. 1197). The court cannot say on the record before it that Gilchrist's fabrication of evidence was a "highly predictable or plainly obvious consequence" of

the City's alleged inadequate training program. *Carr*, 337 F.3d at 1229.

As to the failure to supervise theory, the court finds, as with the failure to train theory, that there was no pattern of tortious conduct to put the City on notice that its supervision was inadequate or that the inadequacy was substantially certain to result in a violation of Bryson's constitutional rights. Again, there is no evidence of any complaints or criticisms of the work of any City forensic chemists prior to 1980 or from 1980 to 1983. Such absence of evidence makes this case distinguishable from the *Pierce v. Gilchrist* case, wherein the court found that by 1986, the relevant time period in that case, the OCPD had been alerted to serious deficiencies in Gilchrist's analysis and questions about her professionalism, in more than one case, and had taken no action in response. In this case, there is no evidence of any criticism of Gilchrist's analysis of forensic evidence or of any questions about her professionalism during the relevant time period. Indeed, Pearson, Bryson's trial counsel, testified in deposition that "Gilchrist's reputation was not – had not been attacked" and "there [were] no suspicions in 1983." City's Ex. 34, p. 101, ll. 15-19. There is no evidence of any complaints or criticisms of other chemists. The court therefore concludes that there is no evidence of a pattern of tortious conduct that would have put the City on notice of its inadequate supervision or that the inadequacy was substantially certain to result in the deprivation of Bryson's constitutional rights.

The court also finds that this case is not within the "narrow range of circumstances" alluded to by the Court of Appeals in Carr. The court concludes that there is insufficient evidence for a reasonable jury to conclude that it was highly predictable or plainly obvious that the alleged failure to supervise and implement quality controls, i.e., peer review, would have led to the constitutional violation suffered by Bryson at the hands of Gilchrist.

Because the court concludes that the evidence in the record is insufficient to demonstrate the deliberate indifference requirement of the failure to train and supervise claims, the court finds that the City is not liable under § 1983 for the alleged failure to train or supervise. Summary judgment in favor of the City is therefore appropriate.

F. *State Law Claim Against Gilchrist*

Plaintiff has alleged a state law claim against Gilchrist for negligence resulting in wrongful conviction. Gilchrist contends that she is entitled to summary judgment on this claim because she was acting within the scope of her employment when the alleged wrongful conduct occurred. Under the Governmental Tort Claims Act, the City, as Gilchrist's employer, is liable, exclusively, for any loss resulting from Gilchrist's alleged tort if it was committed while she was acting within the scope of her employment. 51 O.S. 2001 § 153, *Nail v. City of Henryetta,* 911 P.2d 914, 916 (Okla.1996). However, an employee may

be held liable for an alleged tort if the tort was committed while acting outside the scope of employment. *Id.* An employee is not acting within the scope of her employment if she "acted maliciously, or in bad faith." *Id.*; 51 O.S. 2001 152(9) (defining scope of employment as "performance by an employee acting in good faith within the duties of [her] office or employment or of tasks lawfully assigned by a competent authority. . . .") Gilchrist contends that she was acting in good faith. She argues that there is no evidence that she acted maliciously or in bad faith. Further she contends that plaintiff concedes that she was acting within the scope of her employment because he maintains that she was acting under color of state law for purposes of the § 1983 claim.

The question of whether an employee was acting within the scope of her employment is normally a question for the jury, except in cases where only one reasonable conclusion can be drawn. *Nail,* 911 P.2d at 918. Viewing the facts in a light most favorable to plaintiff, and drawing reasonable inferences from those facts, the court cannot conclude that only one reasonable conclusion can be drawn from the evidence. The court concludes that a genuine issue of material fact exists as to whether Gilchrist was acting within the scope of her employment. The court rejects Gilchrist's argument that she was acting within the scope of her employment if she was acting under the color of state law for § 1983 purposes. *See, e.g. Brown v. Gray,* 227 F.3d 1278, 1290 & n. 7 (10th

Cir.2000); *Houston v. Reich,* 932 F.2d 883 (10th Cir.1991).

G. *State Law Claim Against Macy*

In the "Conclusion" portion of his brief, Macy asserts that "he is entitled to summary judgment in his favor on all claims." *See,* doc. no. 108, p. 38. As previously stated, plaintiff has alleged a state law claim against Macy. As is the case with Gilchrist, this claim is a claim of negligence resulting in wrongful conviction. Unlike Gilchrist, however, Macy presents no developed argument challenging that claim. He only challenges his liability with respect to the § 1983 claims. The court declines to address the merits of the claim without a specific challenge from Macy. This claim therefore proceeds to trial.

H. *Cross-Claim Against City*

In addition to her answer filed on March 21, 2007, Gilchrist filed a cross-claim against the City seeking indemnification for damages, fees and costs and a defense. The City has answered the cross-claim. Neither Gilchrist nor the City has addressed the cross-claim in the summary judgment motions. The cross-claim therefore remains at issue for resolution.

V. *Conclusion*

Based upon the foregoing, Defendant City of Oklahoma City's Motion for Summary Judgment, filed January 8, 2009 (doc. no. 105), is **GRANTED**. Gilchrist's cross-claim against the City remains at issue. Defendant Robert H. Macy's Motion for Summary Judgment, filed January 9, 2009 (doc. no. 107), is **GRANTED** with respect to the claims challenged in that motion, as discussed above. However, as the state law claim against Robert H. Macy was not challenged by his motion, that claim remains for trial. The Motion for Summary Judgment by Defendant, Joyce Gilchrist, filed January 9, 2009 (doc. no. 110), is in all respects **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID JOHNS BRYSON, Plaintiff-Appellant, v. CITY OF OKLAHOMA CITY, Defendant-Appellee, and JOYCE GILCHRIST, individually, Defendant.	Nos. 09-6143 & 09-6182

ORDER

(Filed Jan. 14, 2011)

Before **MURPHY**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en bane was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elizabeth A. Shumaker
ELISABETH A.
SHUMAKER, Clerk